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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHENIX FEDERAL SAVINGS & LOAN ASSOCIATION, F.A.,
Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Does Fed. R. Civ. P. 51 bar post-verdict and appellate review of actions taken by the trial court as a matter of law simply because the jury was informed of the trial court's intention to take that action in a jury instruction to which there was no objection?

2. Do erroneous legal principles articulated in jury instructions become the "law of the case" for purposes of post-verdict review under Fed. R. Civ. P. 59 and subsequent appellate review even if correction of the error would not require a new trial, disturb any jury fact-finding, or otherwise offend the Seventh Amendment?

3. If a jury instruction to which there is no objection misallocates the burden of proof on an important issue, is the misallocation "plain error" or is appellate review precluded by Fed. R. Civ. P. 51?

LIST OF PARTIES

The petitioner before this Court is Phenix Federal Savings & Loan Association, F.A., which is the successor-in-interest to Phenix Federal Savings & Loan Association. Petitioner was substituted for Phenix Federal Savings & Loan Association during the proceedings before the United States Court of Appeals for the Eighth Circuit. Petitioner is an assuming association chartered by the Federal Home Loan Bank Board on September 18, 1987 for the express purpose of acquiring the deposits, offices, assets and liabilities of Phenix Federal Savings & Loan Association, which was closed on that same date. This transfer took place pursuant to the Federal Home Loan Bank Board's management consignment program whereby the operations of troubled financial institutions are stabilized in order to evaluate long-term solutions while continuing to provide services to the institution's customers and community.

Respondent is now known as Shearson Lehman Hutton, Inc. At the time of the filing of the Complaint, it was known as Shearson/American Express, Inc. At the time of the events underlying that Complaint, its name was Shearson Loeb Rhoades, Inc.

The following were also parties to the proceedings before the Court of Appeals for the Eighth Circuit: Hansen-Friedrichsen, Inc.; Dallas County Alcohol, Inc.; Jerry Hansen; Yvonne Hansen; Haupert Livestock, Inc.; Donald E. Haupert and Eloise Haupert. The following were parties to the proceedings before the United States District Court for the Southern District of Iowa, but were not parties to the appeal: Conrad Industries Corporation; Van Buren County Alcohol, Inc.; Leonard Conrad; Marietta Conrad and Conrad Farms, Inc.

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Petitioner,

vs.

SHEARSON LOEB RHOADES, INC., k/n/a SHEARSON/AMERICAN EXPRESS, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Phenix Federal Savings & Loan Association, F.A., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered September 9, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 856 F.2d 1125 (8th Cir. 1988) and is reprinted in the Appendix. (App. A-1). The memorandum decision of the United States District Court for the Southern District of Iowa (Stuart, J.), denying Petitioner's Motion to Amend the Judgment or for New Trial, is unreported and is reprinted in the Appendix. (App. A-29).

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its original judgment on March 10, 1988. Petitioner sought rehearing by the panel and rehearing en banc. The petition for rehearing en banc was denied on May 3, 1988. The petition for rehearing by the panel was denied on Sptember 9, 1988, at which time the court vacated its judgment of March 10, 1988, withdrew its opinion, and filed an amended and substituted opinion. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL AND FEDERAL RULES PROVISIONS INVOLVED

Amendment VII to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Rule 51 of the Federal Rules of Civil Procedure is captioned "Instructions to Jury: Objections" and provided at the time of trial:

> At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Rule 59 of the Federal Rules of Civil Procedure is captioned "New Trials; Amendment of Judgments" and provides:

> (a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> (b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.
>
> (c) *Time for Serving Affidavits.* When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.
>
> (d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

STATEMENT OF THE CASE

On May 4, 1982, Phenix Federal Savings & Loan Association (hereinafter "Phenix Federal") and others filed a Complaint in the United States District Court for the Southern District of Iowa alleging that Respondent Shearson Loeb Rhoades, Inc. (hereinafter "Shearson") breached a commitment to provide permanent financing to Van Buren County Alcohol, Inc. (hereinafter "VBCA") for construction of an ethanol plant in Van Buren County, Iowa. In reliance on this "take-out" commitment and other express representations made to it by Shearson, Phenix Federal in March 1981 provided a $1.6 million interim construction loan to VBCA that was to be repaid six months later with the proceeds of the permanent financing to be provided by Shearson. Shearson failed to provide the permanent financing. Phenix Federal lost not only the principal and interest of the original loan, but also the principal and interest of subsequent advances Phenix Federal made in an attempt to stablize the ethanol plant and protect its original loan in the wake of Shearson's breach. Jurisdiction in the District Court was based on diversity of citizenship. 28 U.S.C. § 1332(a)(1).

The trial began in January 1985 and was bifurcated into liability and damage phases. During the liability phase, the jury found that Shearson had indeed breached its commitment and was liable to Phenix Federal based on the legal doctrines of negligent misrepresentation and promissory estoppel. During the damage phase and in response to special interrogatories, the jury awarded Phenix Federal over $5.1 million in damages.[1] The

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[1] The jury found that Phenix Federal had lost $1,600,000 plus $761,721 in interest on the original loan, $2,761,733 in principal and interest on its subsequent advances, and $25,000 in expenses for overseeing the operations of the plant. (App. A-9 to A-10). The total award was $5,148,454.

district court, however, reduced this damage award to zero because of what he perceived to be the legal effect of a bond issue involving the same plant that occurred in December 1984, a few days before the trial began.

This December 1984 bond issue was prompted by efforts to mitigate the rising losses associated with the ethanol plant while this matter awaited trial. For a substantial period during the 2½ years between the filing of the Complaint and trial, the plant was idle, squeezed between the high cost of corn and the low price of gasoline, while the costs of the plant's debt service continued to mount. When the price of corn dropped in late 1984, a few weeks before the trial began, VBCA's owners and their involuntary partner, Phenix Federal, decided to try to reopen the plant to help stem the rising losses. If the plant were to have any chance at economic viability, a means had to be found to refinance the debt, most of which had been incurred in the high interest years of 1981-1983.

A decision was made to refinance the debt with $7,795,000 of industrial revenue bonds issued through the offices of the city of Bonaparte, Iowa. Because of the ethanol plant's bleak history, the bonds were sold subject to very strict conditions. Foremost among them was the requirement that Phenix Federal guarantee the bonds by delivering an $8,264,405 letter of credit and $15,334,263 of collateral, consisting of negotiable securities owned by Phenix Federal, to the bond trustee.

This bond financing, which is referred to as the 1984 or MTJ bond issue, refinanced the plant's debt at a lower interest rate. Of the $7,795,000 of new bond proceeds, $6,500,000 was turned over to Phenix Federal in exchange for the letter of credit, the collateral, and Phenix Federal's subordination of its first mortgage on the ethanol plant to that of the bond trustee. Phenix Federal would only realize a net benefit on the 1984 bond transaction if it did not have to honor its letter of credit during the 20-year term of the bonds. That required the ethanol plant to be profitable through the year 2004. Given the unlikelihood of

that prospect, Phenix Federal's auditors classified the $6.5 million Phenix Federal received as a "borrowing."

Phenix Federal's trial counsel advised the district court during a pretrial hearing on January 14, 1985, that the 1984 bond issue was irrelevant to the instant case, adding:

> the financial exposure Phenix Federal had has not been changed as a consequence of the bond issue. We had to place up securities and still carry it on our books as a debt and still guaranteed in essence by [VBCA], but it did provide a way and a means of lowering the interest rate that this plant was having to carry.

At the close of the evidence, however, the district court held that the $6.5 million had to offset any damages Phenix Federal received from the jury for Shearson's 1981 breach and negligent misrepresentations — unless Phenix Federal had proven that the ethanol plant would fail before the year 2004 and that Phenix Federal would have to honor its letter of credit as a consequence. The district court advised the jury of its intention in Damage Instruction No. 41, which was crafted by the district court and not propounded by either party. In that instruction, the court stated:

> Phenix Federal has received 6.5 million dollars from the proceeds of the MTJ bond issue. However, it has guaranteed the payment of principal and interest on those bonds in the event MTJ is unable to make the required payments as they become due. Phenix Federal has obtained guarantees from Leonard Conrad and Van Buren County Alcohol under which they are to reimburse Phenix Federal for whatever payments it would be called upon to

make.[2] In addition, Phenix Federal has a second mortgage on the alcohol plant.

Phenix Federal's liability for payments on the MTJ bonds is contingent upon the success of the alcohol plant, the value of the plant, and the guarantees of Leonard Conrad and Van Buren County Alcohol. It is for you to determine what, if any, amount Phenix Federal may be called upon to pay over the life of the bonds for which it will not be reimbursed, reduced to its present value. This amount, in any, would constitute damages. . . .

It is also for you to determine the amount of damages, if any, sustained by Phenix Federal under its other claims for consequential damages, as a result of Shearson's negligent misrepresentations or promissory estoppel. *The Court will then total the various items of damages that you have found were sustained by Phenix Federal as a result of Shearson's failure to provide permanent financing, and reduce that amount by 6.5 million dollars, or if the total damages [are] less than 6.5 million dollars, the Court will reduce Phenix Federal's recovery to zero. This is a matter for the Court and you must not give any consideration to the 6.5 million dollars in arriving at the amount of damages.* (Emphasis added).

Phenix Federal's trial counsel failed to object to Instruction No. 41, or the special interrogatory which asked the jury:

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[2] Since VBCA and Leonard Conrad, the principal stockholder of VBCA, had not been able to repay the original Phenix Federal loan, these guarantees were obviously of little value. As the Eighth Circuit observed: "Phenix obtained a guarantee from Conrad and Van Buren County Alcohol that they would reimburse it for any payment it might make under the letter of credit. Of course, given its recent experience with those debtors, it could not be certain the guarantee would be good." (App. A-8).

> Has Phenix Federal established by a preponderance of the evidence it [sic] claim for CONTINGENT LOSS CONSISTING OF THE AMOUNT OF PRINCIPAL AND INTEREST ON THE MTJ BONDS THAT PHENIX FEDERAL MAY PAY FOR WHICH IT WILL NOT BE REIMBURSED UNDER THE GUARANTEES OR THE PLANT MORTGAGES, REDUCED TO PRESENT VALUE [?]:

The jury answered this special interrogatory in the negative, prompting the court to offset the $6,500,000 against the $5,148,454 in damages the jury found Phenix Federal incurred and to enter judgment for Phenix Federal with an award of zero damages.

Phenix Federal made a timely motion pursuant to Fed.R.Civ.P. 59 to amend the judgment or for a new trial. It argued that the 1984 bond issue was a "collateral source" and its proceeds could not properly offset the damage award to Shearson's benefit. Moreover, the ethanol plant was already in default on the bonds. At best the 1984 bond issue would permit Phenix Federal to spread its loss over time.

Shearson responded on October 9, 1985 that Phenix Federal had waived these arguments under Fed.R.Civ.P. 51 by failing to make a specific objection to the jury instructions and, in particular, to Instruction No. 41. The district court adopted this position in its Ruling and Order on Post-Trial Motions. It simply denied Phenix Federal's motion "for the reasons stated in Shearson's resistance filed October 9, 1985." (App. A-47). The district court therefore never considered the substance of Phenix Federal's legal arguments against the offset.

The ethanol plant subsequently did fail and on April 11, 1986, Phenix Federal had to honor the full amount of its letter of

credit.[3] That ultimately triggered Phenix Federal's failure; it was closed by the Federal Home Bank Board on September 18, 1987.

Before the United States Court of Appeals for the Eighth Circuit, Phenix Federal argued that the propriety of the offset was purely a question of law and that the district court specifically advised the jury that the offset was solely a matter for the court and should not affect their deliberations. If the offset was improper, it could be reversed without upsetting any jury fact-finding or requiring a new trial. The court simply had to enter judgment for $5,148,454. Therefore, the district court erred in not reaching the substance of Phenix Federal's legal arguments supporting its Rule 59 motion.

As for the substance of the legal arguments, Phenix Federal maintained that the trial court improperly treated the $6.5 million in 1984 bond proceeds as relevant to the question whether Phenix Federal had been damaged by Shearson's conduct in 1981, *i.e.*, as part of Phenix Federal's case-in-chief. At most, those proceeds raised the question whether Phenix Federal had been compensated for or had successfully mitigated its damages.

Phenix Federal argued that the $6.5 million offset was improper for two independent reasons: it was a collateral source payment and the amount of that payment was not reasonably certain. Assuming *arguendo* it was reasonably certain Phenix Federal would never have to honor its guarantee of the 1984 bonds and the supporting letter of credit, the offset was improper under Iowa's collateral source rule, which is essentially the same as that of other American jurisdictions. Not only was

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[3] Judgment was entered by the district court in the instant case on February 28, 1986. On August 29, 1986, Phenix Federal moved to supplement the record before the Eighth Circuit with information about the ethanol plant's default on the bonds issued in 1984. The motion was granted on September 3, 1986.

the $6.5 million in bond proceeds received from a source independent of Shearson, but it involved proceeds for which Phenix Federal separately contracted. There was consideration in the form of an irrevocable letter of credit, the posting of $15 million in collateral, increased financial exposure, and subordination of a mortgage interest.

Of course, the prospects of the plant through 2004 were far from reasonably certain. Iowa courts have long held as a matter of law—again consistent with the law of other American jurisdictions—that benefits or payments that are speculative cannot offset damages, even if they are *not* from a collateral source. It was this general principle that prompted this Court to hold that damages to a defrauded tax shelter investor should not be reduced under provisions of the securities acts by any tax benefits the investor has received as a result of the tax shelter investment. *Randall v. Loftsgaarden,* 478 U.S. 647 (1986). Whatever the complexities involved in calculating past tax benefits, they pale in comparison to those involved in predicting the prospects, through the year 2004, of an untried technology squeezed between two of the most volatile markets in the world—commodities and energy. Shearson's own counsel during closing argument called the task "impossible."[4] Consequently, any "benefit" from the 1984 bond transaction was too uncertain as a matter of law to offset Phenix Federal's damages.

Finally, Phenix Federal maintained that if the $6.5 million was relevant at all, it was as evidence of mitigation of damages. Under Iowa law, the defense of mitigation must be pled and

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[4] The district court also implicitly acknowledged the impossibility of the task when it granted Shearson judgment n.o.v. and set aside the jury's award of lost profits to VBCA for the historical years 1982 and 1983. In doing so, the district court cited the ethanol industry's lack of track record and the uniqueness of this particular plant. He noted "the plant being constructed was a minimum size to make the project economically viable and there was no history of profitability for a plant of this size." (App. A-34).

proven by the asserting party. The defendant has the burden to plead and prove its right to a credit. So even if the $6.5 million had not been from a collateral source, and if the prospect of the plant over the next twenty years had been at least amenable to proof to a reasonable certainty, it is clear that the burden should have been placed on Shearson to prove what, if any, net benefit Phenix Federal would realize on the 1984 bond issue. The logic underlying this allocation of burdens is that the wrongdoer should bear the risk of nonpersuasion.

The Eighth Circuit affirmed the judgment of the district court, holding that the failure to object to Instruction No. 41 did bar review of the propriety of the offset. It observed that "[Phenix Federal] makes legal arguments against the offset of the bond proceeds against its award, but we do not need to reach them for Phenix failed to object to the jury instruction it finds offensive and therefore has failed to preserve the alleged error for review." (App. A-10). Regarding the argument that the waiver standard of Rule 51 was inapplicable, the court of appeals responded:

> Phenix argues that it appeals not from the instruction, but from the Court's action in entering judgment for an amount less than the verdict. The Court told the jury that it, the Court, would reduce the jury's damages verdict by $6.5 million. This, the argument runs, was not an explanation of the law made to guide the jury's deliberation, but a declaration of the Court's intent to offset the jury's verdict; thus it was not a "jury instruction."
>
> We reject this argument. The instruction explained the law applicable to the case, as all jury instructions do. The Court instructed the jury that the law in this case required the offset, regardless of what it found Phenix's damages to be. If Phenix disagreed with this statement of the applicable law, it should have objected to the instruction.

(App. A-10 n.2).

Although the court of appeals acknowledged that it has in the past recognized a "plain error" exception to the Rule 51 waiver rule and conceded the instruction at issue might be "arguable," it "emphasize[d] the extremely narrow scope of [the plain error] rule in civil cases." (App. A-11). The court of appeals concluded, without any legal analysis, that there was no such error here.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's Holding That Failure To Object To An Instruction That Informs The Jury Of Actions The Trial Court Intends To Take As A Matter Of Law Precludes Plenary Post-Verdict Review Of Those Actions Is Inconsistent With Decisions Of Other Courts Of Appeals And Reflects A Need For Guidance From This Court.

The propriety of offsetting proceeds from the 1984 bond issue against damages incurred as a result of Shearson's 1981 breach was solely a question of law that did not implicate the jury's fact-finding in any way. The jury was specifically instructed that the district court intended to make the $6.5 million offset, that "[t]his is a matter for the Court," and that the jury "must not give any consideration to the 6.5 million dollars in arriving at the amount of damages." Nevertheless, both the district court and the court of appeals held that by failing to object to this instruction, Fed.R.Civ.P. 51 precluded consideration of the propriety of the $6.5 million offset — at the appellate level and at the trial level under Fed.R.Civ.P. 59. This hypertechnical reading of Rule 51 is particularly striking in light of the substantial post-verdict adjustments the district court made to the damages awarded to other plaintiffs against Shearson (App. A-29 to A-47).

We submit that the result below is fundamentally at odds with the purposes and logic of Fed.R.Civ.P. 51 and 59. This case dramatizes a general confusion in the lower courts on the relationship between jury instructions and post-verdict motions. There is no consensus whether legal principles articulated in jury instructions without objection become — by virtue of Rule 51 or more general juridical considerations — the "law of the case," not simply for the purpose of precluding post-verdict attack on decisional rules communicated to and presumably relied

upon by the jury, but also for purposes of post-verdict motions under Fed.R.Civ.P. 50 and 59 that do not question or impugn any factual conclusion reached by the jury. This case provides the Court with a vehicle for much-needed clarification of the role of Fed.R.Civ.P. 51 and the law of the case doctrine in post-verdict motions, particularly those arising under Fed.R.Civ.P. 59.

As the Eighth Circuit itself has acknowledged, the purpose of Rule 51 "is to make certain the trial court is 'adequately informed' so as to obviate the necessity for a new trial." *McCamley v. Shockey,* 636 F.2d 256, 260 (8th Cir. 1981). The rule is designed to encourage litigants to assist the court in formulating and communicating the correct decisional rules to the jury so the exercise need not be repeated. But no purpose of Rule 51 is advanced by barring review of an erroneous legal principle or consequence simply because it was articulated in a jury instruction, where it was not communicated for the purpose of guiding the jury's fact-finding and its correction does not require a new trial.[5]

Although the Court has never directly addressed these issues, it has suggested that Rule 51 waiver principles should not be rigidly invoked in situations where doing so would not advance the fairness and judicial efficiency policies underlying Rule 51. In *City of Newport v. Fact Concerts, Inc.,* 453 U.S. 247 (1981), the Court confronted a situation where a jury was charged,

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[5] Indeed, articulation of legal principles or consequences in jury instructions that is not intended or necessary to guide the jury's deliberations is inconsistent with the general scheme of the Federal Rules of Civil Procedure. Instruction No. 41 was obviously intended to provide guidance to the jury in responding to special interrogatories concerning consequential damages. Such interrogatories are authorized by Fed.R.Civ.P. 49. In noting that a district court properly refused to inform the jury of the consequences of the answers to special interrogatories, the Ninth Circuit recently observed: "Fed.R.Civ.P. 49 is designed to *prevent* the jury's view of the correct result from interfering with factual findings." *Carvalho v. Raybestos-Manhattan, Inc.,* 794 F.2d 454,457 n. 2 (9th Cir. 1986) (emphasis added).

without objection, that it could award punitive damages against a municipality under 42 U.S.C. § 1983. On appeal the First Circuit held that because no objection was made to the instruction, Rule 51 barred plenary review and it could only reverse if the instruction was "plain error."

In refusing to limit itself to "plain error" review, this Court observed that the trial court had addressed the merits of the punitive damages issue and "no interests in fair and effective trial administration advanced by Rule 51 would be served if we refused now to reach the merits ourselves." *Id.* at 256. The Court stated:

> Ordinarily, an error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict. In this case, however, we deal with a wholly separable issue of law, on which the jury rendered a special verdict susceptible of rectification without further jury proceedings.

Id. at 256 n. 12. Indeed, the post-verdict review the Court sanctioned in *City of Newport* is much more intrusive than the Rule 59 review that Phenix Federal sought from the district court. In *City of Newport* the Court as a matter of law upset a jury award of punitive damages, whereas a ruling in this case on the propriety of the offset as a matter of law does not challenge any jury award or finding.

The Second Circuit, in reliance on *City of Newport,* recently held that the failure to object to a punitive damage instruction in a Lanham Trademark Act case did not prevent it from reaching the question whether punitive damages are available under that Act. It noted:

> the resolution of these purely legal arguments will not require further proceedings on that point in the district court. Consequently, the circumstances of the instant case warrant an examination of the merits of this Lanham Act

> issue and "no interests in fair and effective trial administration advanced by Rule 51 would be served" by a refusal to reach it.

Getty Petroleum Corp. v. Bartco Petroleum Corp., 858 F.2d 103, 108 (2nd Cir. 1988). The Second Circuit concluded that "despite its language Rule 51 should not be applied inflexibly." *Id.*

Yet a review of cases in the federal courts of appeal, many arising under Fed.R.Civ.P. 50, indicates that there is no clear understanding as to what role the failure to object to jury instructions should play in post-verdict motions. A good deal of the confusion seems to originate with the concept of "law of the case." In *Firestone Tire & Rubber Co. v. Pearson,* 769 F.2d 1471 (10th Cir. 1985), for example, the issue was whether certain warehouse agreements, by their express provisions, superseded and cancelled any rights and obligations of the parties arising under prior agreements. Firestone argued in its motions for directed verdict and for judgment n.o.v. under Fed.R.Civ.P. 50 that any prior agreements had been superseded as a matter of law by the warehouse agreements. The Tenth Circuit held that it could not consider this issue because Firestone had failed to object to a jury instruction that essentially admitted the validity of the prior agreements. "Where no objections are made to instructions at trial, the substance of the instructions become part of the law of the case." *Id.* at 1477. *See also Wells Real Estate v. Greater Lowell Board of Realtors,* 850 F.2d 803 (1st Cir. 1988), *cert. denied,* 57 U.S.L.W. 3343 (Nov. 14, 1988) (in Sherman Act case failure to object to erroneous jury instruction on interstate commerce nexus makes erroneous instruction "law of the case" and precludes appellate review, even if issue is properly one for court and should not have been submitted to jury).

The Seventh Circuit, in contrast, has recently taken a more flexible approach. In *Rakovich v. Wade,* 850 F.2d 1180 (7th Cir. 1988), *cert. pending,* No. 88-598 (filed Oct. 8, 1988), both

parties argued an erroneous standard of immunity under 42 U.S.C. § 1983, the district court incorporated this erroneous test in a jury instruction, and the jury was permitted to make the legal determination of the applicability of the immunity to the defendants — even though that issue was properly a question of law for the court. The defendants did not challenge the jury's role or the jury instruction in either the trial or appellate court. Nevertheless, the Seventh Circuit held Rule 51 did not preclude its examination of the issue because its review was not of the erroneous instruction and the jury's decision in light of that instruction, but rather of the failure of the district court to grant a directed verdict as a matter of law on the immunity issue. Accordingly, the court determined it was not bound by the law as set forth in the erroneous jury instruction:

> [T]his is not a jury instruction issue where the failure to object or a defendant's provision of the incorrect legal standard becomes the law of the case. To the contrary, this is a legal question reviewed *de novo* by the appellate court, requiring our application of the correct legal theory.

Id. at 1204. However, the court did indicate that jury instructions to which there was no objection may become the "law of the case" for the purpose of gauging the sufficiency of the evidence pursuant to a motion for judgment n.o.v. *Id.* at 1192. *See also Dual Manufacturing & Engineering, Inc. v. Burris Industries, Inc.*, 619 F.2d 660, 662-63 (7th Cir.) (en banc), *cert. denied*, 449 U.S. 870 (1980) (failure to object to jury instruction on obviousness did not bar appellate review where issue should have been decided as matter of law by the court).

A third, and we submit correct, approach is evident in Judge Henry Friendly's opinion for the Second Circuit in *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812 (2nd Cir. 1984), where he indicated that unexcepted-to instructions are not even the law of case when gauging the sufficiency of the evidence upon a motion for judgment n.o.v. In reversing the district court's order setting aside a verdict as unsupported by the

evidence, Judge Friendly wrote that this order must be viewed "in the light of the 'applicable law which is controlling, and not what the trial court announces the law to be in [its] instructions.' " *Id.* at 825-26 n. 17, quoting *Coca Cola Bottling Co. v. Hubbard,* 203 F.2d 859, 862 (8th Cir. 1953).

This latter approach also comports with observations that have been made by members of this Court. In *City of St. Louis v. Praprotnik,* 108 S.Ct. 915 (1988), the plurality found that a municipality's failure to object to an erroneous instruction on a municipality's liability for the allegedly unconstitutional acts of its employees did not preclude appellate review, under the correct legal standard, of the denial of the city's motions for directed verdict and judgment n.o.v.

> Although the same legal issue was raised both by those motions and by the jury instruction, "the failure to object to an instruction does not render the instruction the 'law of the case' for purposes of appellate review of the denial of a directed verdict or judgment notwithstanding the verdict."

Id. at 922, quoting *City of Springfield v. Kibbe,* 480 U.S. 257, 264 (1987) (opinion of O'Connor, J., *dissenting*).

If a jury instruction to which there is no objection does not constitute the "law of the case" for purposes of motions for directed verdict and judgment notwithstanding the verdict under Fed.R.Civ.P. 50, then *a fortiori* it cannot constitute the "law of the case" with respect to motions for new trial or to amend the judgment under Rule 59. Rule 59 post-verdict remedies were intended to be broader and more discretionary. While the failure to move for a directed verdict precludes a successful motion for judgment n.o.v. by virtue of the language of Rule 50 and the logic of the Seventh Amendment, motions for a new trial or to amend the judgment are not so limited. As Professor Moore has commented:

> . . . Rule 59 does not make a motion for a directed verdict a precondition to a motion for a new trial. Further, the re-

> quirement of this precondition in the case of a motion for judgment n.o.v. was derived from Seventh Amendment considerations not relevant to the motion for a new trial. The most recent court of appeals decisions have recognized that such a requirement should not be read into Rule 59 to preclude a just determination of the merits of a controversy because of a procedural mistake.

6A Moore's Federal Practice ¶59.04[5] at 59-22.

In this spirit the Sixth Circuit has considered the relationship between Rule 51 waiver and a motion for a new trial under Rule 59. In *Solomon v. United States,* 276 F.2d 669 (6th Cir.), *cert. denied,* 364 U.S. 890 (1960), the United States brought a civil suit alleging that the defendants had conspired to fraudulently obtain surplus steel in violation of the Surplus Property Act of 1944. That statute proscribed conspiracy "for the purpose of securing or obtaining . . . for any person any . . . property, or other benefits from the United States or any Government agency in connection with the disposition of property under this Act." 50 U.S.C. App. § 1635(b) (1944). At the close of the government's case, the district court sustained a directed verdict motion in favor of the only government employee alleged to be part of this conspiracy.

The trial court, without objection, erroneously instructed the jury under the Federal Property and Services Act of 1949 rather than the 1944 Act. The 1949 Act proscribed conspiracy in connection with the "procurement, transfer, or disposition" of government property. The defendants pointed out this error to the trial court in their motion for a new trial. The defendants also argued that since the 1944 Act only concerned "disposition" of government property, it was necessary that a government agent be part of the conspiracy. Therefore, they argued, when the court dismissed the case against the government employee, it should have dismissed the case against the other defendants as well.

The Sixth Circuit held that this contention was not waived by the failure to object to the erroneous instruction.

> The point was first raised in appellants' motion for a new trial, after it was discovered by counsel that the instruction had been based upon the 1949 Act, instead of upon the 1944 Act. If, as a matter of law under the 1944 Act, there existed no cause of action against the appellants following the dismissal from the case of the government agent, the point was properly raised by the motion for a new trial and will be considered on this review.

276 F.2d at 674.

Likewise, the motion for new trial arguing that the $6.5 million offset was improper as a matter of law preserved that issue for appellate review. The result below squarely conflicts with *Solomon*. Indeed, a reversal in *Solomon* would have required the district court to dismiss the claim and negate the jury's findings of liability. As we have emphasized, reversal of the $6.5 million offset would have only required a modification of the judgment and would not have upset any jury fact-finding. That is why the offset issue was also properly amenable to a motion to alter or amend the judgment in addition to a motion for a new trial.

Given the Seventh Amendment limitations on motions to alter or amend the judgment, rigid application of Rule 51 waiver and the "law of the case" concept is particularly anomalous and hypertechnical. The purpose of Fed.R.Civ.P. 59(e) is "to 'make clear that the district court possesses the power' to rectify its own mistakes in the period immediately following the entry of judgment." *White v. New Hampshire Department of Employment Security,* 455 U.S. 445, 450 (1982), *quoting,* Notes of Advisory Committee on 1946 Amendment to Rules, 28 U.S.C., p. 491; 5 F.R.D. 433, 476 (1946). "Rule 59(e) does not authorize the court to alter or amend a judgment entered upon a jury's verdict *in any manner that would constitute a re-examination of the facts found by the jury in contravention of*

the Seventh Amendment." 6A Moore's Federal Practice ¶59.12[1] at 59-288 (emphasis added). Obversely, if the proposed amendment to the judgment does not require the district court to re-examine any facts found by the jury, Rule 59(e) is the appropriate mechanism for post-judgment "reconsideration of matters properly encompassed in a decision on the merits." *White, supra,* at 451.

Therefore, Rule 59(e) motions inherently pose no threat to the policies underlying Rule 51. Only if the amendment does not require a re-examination of facts found by the jury is it cognizable under Rule 59(e). The Eighth Circuit's further imposition of a rigid Rule 51 waiver standard is procedural overkill.

This Rule 51 overlay also deflected the Eighth Circuit from the appropriate standard of review of denial of Rule 59(e) motions. Rule 59(e) motions are committed to the sound discretion of the trial judge. Because the district court thought review of the offset was precluded by Rule 51 he did not exercise his discretion. "He did not act in the exercise of his judicial discretion, but under the compulsion of a mistake of law." *Finn v. American Fire & Casualty Co.,* 207 F.2d 113, 116 (5th Cir. 1953), *cert. denied,* 347 U.S. 912 (1954). When a judge abdicates a discretionary power because he believes a legal doctrine gives him no choice in the matter, the appellate court should subject that doctrine to plenary review. Thus the Sixth Circuit has held that "when the lower court rejects an application under Rule 59(e) based upon an erroneous legal doctrine, [the appellate] standard of review is the same as in other cases of legal error." *Huff v. Metropolitan Life Ins. Co.,* 675 F.2d 119, 122-23 n. 5 (6th Cir. 1982). If an unexcepted-to instruction is not the law of the case for purposes of an otherwise legitimate Rule 59(e) motion, the Eighth Circuit was obligated to address Phenix Federal's legal arguments against the offset.

Although there is little consistency in their approaches, the above cases demonstrate that other courts have not found that

Rule 51 or the law of the case limits a post-verdict motion where that motion does not require the court to engage in fact-finding. The Fifth Circuit has gone so far as to hold under Rule 59 that where "the court's failure to apply the proper legal measure of damages was a manifest error of law," "it is the duty of the court to grant the relief to which the plaintiff is entitled irrespective of the prayer for relief." *Hutches v. Renfroe,* 200 F.2d 337, 341 (5th Cir. 1952).

As the United States District Court for the Eastern District of Pennsylvania observed in a case arising under Fed.R.Civ.P. 59(e), where there is no "interference with the fact-finding function of the jury" "the doctrine of 'law of the case' does not require the Court to perpetuate error once such error is brought to the Court's attention." *McGee v. United States,* 62 F.R.D. 205, 209 (E.D. Pa. 1972). This is sound judicial policy. "Orderly rules of procedure do not require sacrifice of the rules of fundamental justice." *Hormel v. Helvering,* 312 U.S. 552, 557 (1941). By reversing the Eighth Circuit's result below, this Court could eliminate the current uncertainty and insure this policy is universally applied.

II.

There Is A Clear Conflict Among The Federal Courts Of Appeals On Whether Or Not Misallocation Of The Burden Of Proof On An Important Issue Is "Plain Error" Under Fed.R.Civ.P. 51.

The $6.5 million offset against Phenix Federal's damage award was improper as a matter of law. But even if an offset had been proper in theory, Phenix Federal argued below that an offset or credit against damages is an issue of mitigation and the burden should have been placed on Shearson to prove the net benefit Phenix Federal would realize on the 1984 bond issue. Unlike the propriety of the offset as a matter of law, this is concededly a jury instruction issue governed by Fed.R.Civ.P. 51, and there was no contemporaneous objection to Instruction No.

41 or the special interrogatory that assigned the burden to Phenix Federal to prove how much it would lose on the 1984 bond issue. Therefore, the issue is whether this misallocation of the burden of proof is "plain error."

We submit this is the paradigmatic plain error case. For if Shearson had been assigned the burden to prove how much Phenix Federal would realize from the 1984 bond issue, Shearson would have borne the burden of proving the ethanol plant would be successful through the year 2004. As Shearson's trial counsel conceded, the burden of proving the plant's future prospects was, for all practical purposes, impossible to carry. Therefore, the effect of the misallocation of the burden was to reduce a $5.1 million damage award to zero.

A majority of the federal appellate courts that recognize plain error in civil cases have held that misallocation or misstatement of the burden of proof on an important issue constitutes plain error.[6] The Seventh and Ninth Circuits do not recognize a plain

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[6] *See MacEdward v. Northern Electric Co.*, 595 F.2d 105, 109-10 (2nd Cir. 1979) (misallocation of burden of proof on important issue constitutes plain error); *Beardshall v. Minute Press International, Inc.*, 664 F.2d 23, 26-27 (3rd Cir. 1981) (plain error, where there is burden of proof error on critical issue and record fails to indicate that error was *not* prejudicial); *Ratay v. Lincoln National Life Insurance Co.*, 378 F.2d 209, 212 (3rd Cir.), *cert. denied*, 389 U.S. 973 (1967) (*semble*); *Kerr v. State Farm Fire & Casualty Co.*, 731 F.2d 227, 228-29 (4th Cir. 1984) (plain error to assign "preponderance of the evidence" rather than "clear and convincing proof" burden); *Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983) (plain error because proper placement of burden of proof "could have made a substantial difference"); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1372 (5th Cir. 1969) ("burden of proof is always of major importance" for purposes of plain error analysis); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 167 (6th Cir. 1967) (plain error because "law of burden of proof . . . was an essential part of [the] case").

error exception to Rule 51.[7] The First Circuit admits that it "ha[s] continued to acknowledge the plain error rule without, to [its] knowledge, ever using it to upset a verdict." *Wells Real Estate v. Greater Lowell Board of Realtors,* 850 F.2d 803, 809 (1st Cir. 1988), *cert. denied,* 57 U.S.L.W. 3343 (Nov. 14, 1988).[8]

The Eighth Circuit's decision below aligns it more closely with the latter circuits. Certainly it squarely conflicts with those cases cited in footnote 6, *supra.* Although it ostensibly recognizes the plain error exception, the spirit of its opinion below and certainly the result suggest the Eighth Circuit is abrogating, in practice if not in theory, the plain error rule under Fed.R.Civ.P. 51.

Attorneys in the First, Seventh, Eighth and Ninth Circuits are no less fallible than attorneys elsewhere. There should be a meaningful, *national* plain error standard. "Ideally, the recognition of plain error by an appellate court, acting sua sponte or at the request of appellate counsel, will protect

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[7] *See Rakovich v. Wade,* 850 F.2d 1180, 1202 (7th Cir. 1988) (no plain error exception applies in this circuit), *cert. pending,* No. 88-598 (filed October 8, 1988); *Brett v. Hotel, Motel, Restaurant, Construction Camp Employees and Bartenders Union, Local 879,* 828 F.2d 1409, 1414 fn. 7 (9th Cir. 1987) ("[t]his circuit does not apply the 'plain error' rule in order to review jury instructions").

[8] The Eleventh Circuit has twice held that an erroneous burden of proof instruction did not constitute plain error. *See, McClow v. Warrior & Gulf Navigation Co.,* 842 F.2d 1250, 1253 (11th Cir. 1988) (instruction, though errouneous, did not "*misstate* the law as it pertains to the burden of proof") (emphasis by court); *Iervolino v. Delta Air Lines, Inc.,* 796 F.2d 1408, 1415 (11th Cir. 1986) (no plain error in giving erroneous *McDonnell Douglas* allocation of burden of proof instruction in age discrimination case). The Eleventh Circuit has, however, found plain error in the failure to properly instruct on the weight to be given to the testimony of a party-witness. *Pate v. Seaboard Railroad, Inc.,* 819 F.2d 1074, 1083 (11th Cir. 1987).

litigants from the more serious mistakes of counsel or the court below without thrusting the reviewing court into an advocate's position." 10 Moore's Federal Practice § 103.41 at I-39. Misallocation of the burden of proof on an important issue is a very serious mistake. Phenix Federal in this case paid dearly for it. The Court should grant this petition to impose a nationwide rule on the appropriateness of such mistakes for plain error review.

CONCLUSION

Unless there is some uniform, articulated standards for dealing with procedural errors, concepts of "waiver" and "plain error" risk becoming wholly subjective notions that neither guide the lower courts nor protect litigants. Given the pronounced conflicts among the circuits in dealing with these issues, we repsectfully submit that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1407, 86-1408, 86-1409

On Appeal from the United States District Court
for the Southern District of Iowa.

No. 86-1407

Phenix Federal Savings & Loan Association, F.A.,
Appellant,

v.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Appellee.

No. 86-1408

Hansen-Friedrichsen, Inc.; Dallas County Alcohol;
Jerry Hansen; Yvonne Hansen; Haupert Livestock, Inc.;
and Donald E. and Eloise Haupert,
Appellants,

v.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Appellee.

No. 86-1409

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Appellant,

v.

Phenix Federal Savings & Loan Association, F.A.;
Hansen-Friedrichsen, Inc.; Dallas County Alcohol;
Jerry Hansen; Yvonne Hansen; Haupert Livestock, Inc.;
and Donald E. and Eloise Haupert,
Appellees.

On Appeal from the United States District Court
for the Southern District of Iowa.

Submitted: August 8, 1988

Filed: September 9, 1988

Before McMILLIAN, ARNOLD, and BOWMAN,
Circuit Judges.

ARNOLD, Circuit Judge.

This case developed from a complex series of financing deals for three ethanol plants in Iowa. The trial was bifurcated, the liability phase being tried first. The jury found that Shearson Loeb Rhoades, Inc., negligently misrepresented to the owners of the plants, Leonard Conrad, Jerry Hansen, and Donald E. and Eloise Haupert, and their related companies, that it would secure permanent financing of the plants by underwriting industrial development bonds. Shearson was also found to have

broken a contract to provide this financing. In addition, the jury found that Shearson had negligently misrepresented to Phenix Federal Savings & Loan Association, which had provided interim construction financing for the plants, that it would "take out" Phenix by providing permanent financing. Finally, the jury found Shearson liable to Phenix for failing to secure permanent financing on the theory of promissory estoppel.

After the jury had assessed the plaintiffs' damages in the damages trial, the District Court[1] ruled on Shearson's motion for judgment n.o.v., granting it in part and denying it in part. Only part of that ruling is at issue here. Conrad and his related companies have settled with Shearson and dismissed their appeal. In addition, after oral argument Shearson and the Hauperts settled their part of the case, so it is no longer before us. The Hansen plaintiffs (whom we shall call "Hansen" for convenience) claim that the Court erred in granting judgment n.o.v. on their verdicts for breach of contract and in dismissing (before trial) their civil RICO claims, and Hansen argues further that the Court erred in granting judgment n.o.v. on his damages award for loss of credit reputation. Phenix argues that the Court erred in offsetting its damages against the proceeds of a subsequent bond issue that it had helped to arrange as a vehicle for permanent financing of the ethanol plants. As a defensive manuever, Shearson argues in its cross-appeal that, in the event we reverse any part of the judgment favorable to it, the District Court erred in denying its motion for judgment n.o.v. on other grounds it raised. Shearson also urges on cross-appeal that the judgment in favor of Hansen should be reversed or reduced for various reasons.

We affirm in all respects.

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[1] The Hon. William C. Stuart, Senior United States District Judge for the Southern District of Iowa.

I.

We turn first to the appeals of Hansen. As we noted, the jury found Shearson liable to him for breach of contract and negligent misrepresentation. Hansen and Hansen-Friedrichsen, Inc., together were awarded $3,801,105.95 on the contract claim, and $2,801,105.95 (the same damages, less $1 million for loss of credit reputation) on the tort claim. Since the jury had found that these plaintiffs were in part responsible for their damages because of their own negligence, the Court reduced the awards for negligent misrepresentation by the percentage of their fault. No one complains about this reduction.

Despite this reduction of the negligent-misrepresentation verdict, the full damages awards would still have been recoverable for breach of contract. But the Court granted judgment n.o.v. on the contract verdict, and this action prompted Hansen's appeal. Review of this ruling requires a brief discussion of the facts. Leonard Conrad was the "point man" for the three in their search for permanent financing. Through the fall of 1980, he negotiated with an officer of Shearson, and in December of that year the discussion culminated in a letter agreement between Shearson and Conrad Industries, Inc., a company Conrad had formed to build the ethanol plants, that Shearson would finance one of the plants, Van Buren County Alcohol. (Shearson also agreed to finance the other two plants, which would be owned by Hansen and Haupert, but those plants were never built, and Shearson's promise therefore never ripened into a duty to provide financing.) Conrad signed the agreement in his capacity as president of Conrad Industries.

This was the only agreement on which the jury could have based the contract verdict in favor of Hansen. But since he was not a party to the agreement, he had to search for other theories on which to base his claim. The Hansen plaintiffs found two; they alleged that they were third-party beneficiaries of the agreement to finance Van Buren County Alcohol and also that they were undisclosed principals whose agent, Conrad, had

negotiated that agreement on their behalf. Plaintiffs put on evidence to support these theories, and the Court put the issues to the jury on special interrogatories asking (1) whether they had proved that Conrad, acting on their behalf, signed the letter as their agent, and (2) if not, then (and only then) whether they had proved that they were intended third-party beneficiaries of the agreement to finance Van Buren County Alcohol. The jury found for Hansen and Haupert on the agency theory, so it did not reach the third-party beneficiary theory.

In granting judgment n.o.v., the Court held the evidence insufficient, as a matter of law, to prove that Conrad acted as an agent in signing the letter agreement. It ruled further that it was unnecessary to have a new trial to present the third-party beneficiary claim to a jury because the evidence on that issue was also legally insufficient. We find no error in these rulings. The December letter on its face shows that Conrad accepted the agreement as an officer of Conrad Industries. J.A. 533. Hansen's and Haupert's evidence of the alleged agency consisted primarily of the longstanding business and personal relationships they had had with Conrad over the years. But friends and business associates are not *ipso facto* legal agents for one another; though they may have deep trust and confidence in one another, they are not automatically invested with the (legally) greater power to bind each other to contracts.

Nor did the Court err in taking the third-party beneficiary issue from the jury. As Hansen acknowledges, under Iowa law "[t]he real test is . . . whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." *Bailey v. Iowa Beef Processors, Inc.*, 213 N.W.2d 642, 645 (Iowa 1973), *cert. denied*, 419 U.S. 830 (1974). The nearest that the evidence comes to showing this is the natural inference that Conrad, as the friend of Hansen and Haupert, hoped that they would profit by building the ethanol plants. But this falls short of the legal standard. There was no evidence to support a reasonable inference that Shearson in-

tended that they benefit from the agreement with Conrad Industries to finance the Van Buren plant. Viewing these rulings with the degree of deference that they deserve (since they are applications of state law by a district judge sitting in that state), we find no error.

We also hold the Court was correct to dismiss the RICO counts that Hansen alleged. Our decisions require that a RICO plaintiff prove at least two separate schemes in order to demonstrate that a plaintiff has engaged in a "pattern" of racketeering activity within the meaning of the RICO statute. See, *e.g., Holmberg v. Morrisette,* 800 F.2d 205 (8th Cir. 1986), *cert. denied,* 107 S. Ct. 1953 (1987); *Superior Oil Co. v. Fulmer,* 785 F.2d 252 (8th Cir. 1986). The allegation here, that Shearson engaged in a course of fraudulent conduct relating to the financing of ethanol plants, amounts at most to an allegation of a single "scheme" under our cases, and therefore fails to state a claim.

Finally, we affirm the Court's grant of judgment n.o.v. on Hansen's $1 million jury verdict for loss of credit reputation. The Court stated, as a ground for this ruling, that "it is doubtful whether the Iowa Supreme Court would recognize loss of credit reputation as an element of damage in the absence of proof of malice or reckless disregard." *Conrad Industries, Inc. v. Shearson Loeb Rhoades, Inc.,* Civil No. 82-383-A (S.D. Iowa Jan. 16, 1986), slip op. at 8. Hansen expends considerable energy arguing that this was an erroneous ruling of Iowa law. But we need not reach that issue, for the jury awarded Hansen loss-of-credit-reputation damages only on the breach-of-contract action; it expressly found that he suffered no loss of credit reputation as a result of Shearson's negligent misrepresentation. J.A. 286. As the Court ruled, without the contract verdict, there is no basis in fact for Hansen to recover that element of damages.

II.

We turn now to Shearson's cross-appeal in the Hansen case. To the extent that this cross-appeal simply asserts an additional ground for upholding the judgment in Shearson's favor on the contract claim, we need not decide it. We have already upheld this judgment, for reasons given in Part I of this opinion. But Shearson's cross-appeal also challenges the judgment in favor of the Hansens for negligent misrepresentation, and that challenge has independent significance and must be addressed. Shearson presses two issues: (1) the evidence was insufficient to justify a jury verdict for negligent misreprsentation; and (2) the damages awarded to Hansen on this theory are excessive and duplicative.

We reject these arguments. The jury verdict comes to us with a heavy presumption of regularity, reinforced by the refusal of the able and experienced district judge to set it aside. If there is any substantial evidence that reasonable minds could accept as adequate to justify the verdict, we are obliged to uphold it. We hold that the evidence of negligent misrepresentation was legally sufficient. Although we initially believed that the verdict was excessive or duplicative in certain respects, we are now persuaded otherwise by the Hansen plaintiffs. Certain payments that Shearson argues went to reduce the Hansens' liability to Citizens State Bank, and thus their entitlement to damages against Shearson, may in fact have been credited against other obligations. The record is not clear on the point, and ambiguity must be resolved in favor of the jury's verdict. The judgment in favor of the Hansens for negligent misrepresentation is therefore affirmed.

III.

We come now to Phenix's appeal. Phenix provided $1.6 million in interim construction financing for Van Buren County Alcohol, and the jury found that this loan was made in reliance on Shearson's representation that it would provide a

"take-out" loan on the plant, *i.e.*, that Shearson would secure a permanent loan that would be used to pay off Phenix's interim loan. When Shearson failed to provide that financing, Phenix began making advances to Van Buren County Alcohol in order to keep the plant afloat and protect its original loan. These advances, which the jury found to be consistent with prudent lending practices, eventually totalled over $2.75 million in principal and interest.

Eventually Phenix, Conrad, and Van Buren County Alcohol were able to work out permanent financing for the plant. Under this deal, closed in December 1984, the City of Bonaparte, Iowa, issued industrial revenue bonds and lent the proceeds to a newly formed company, MTJ, Inc., which bought the plant from Van Buren County Alcohol for $6.5 million. The $6.5 million was paid to Phenix to satisfy its outstanding loans. However, there were two keys to the deal that exposed Phenix to some risks. First, it agreed to subordinate its first mortgage on the plant, which it had taken as security for the interim-financing loan, to a mortgage in favor of the bond trustee, which had taken as assignment of MTJ's promissory note to the City. Second, Phenix agreed to issue an irrevocable letter of credit to the bond trustee for more than $8.25 million, which would be used to pay bondholders in the event MTJ defaulted on the loan. Phenix obtained a guarantee from Conrad and Van Buren County Alcohol that they would reimburse it for any payment it might make under the letter of credit. Of course, given its recent experience with those debtors, it could not be certain the guarantee would be good.

Phenix claimed the risk it faced in this deal as an element of consequential damages for which Shearson was responsible, and it asked the jury to determine how much it would likely lose on the letter of credit and award it that sum. The Court accepted this theory and instructed the jury:

> Phenix Federal has received 6.5 million dollars from the proceeds of the MTJ bond issue. However, it has

guaranteed the payment of principal and interest on those bonds in the event MTJ is unable to make the required payments as they become due. Phenix Federal has obtained guarantees from Leonard Conrad and Van Buren County Alcohol under which they are to reimburse Phenix Federal for whatever payments it would be called upon to make. In addition, Phenix Federal has a second mortgage on the alcohol plant.

Phenix Federal's liability for payments on the MTJ bonds is contingent upon the success of the alcohol plant, the value of the plant, and the guarantees of Leonard Conrad and Van Buren County Alcohol. It is for you to determine what, if any, amount Phenix Federal may be called upon to pay over the life of the bonds for which it will not be reimbursed, reduced to its present value. This amount, if any, would constitute damages . . . .

It is also for you to determine the amount of damages, if any, sustained by Phenix Federal under its other claims for consequential damages, as a result of Shearson's negligent misrepresentations or promissory estoppel. The Court will then total the various items of damages that you have found were sustained by Phenix Federal as a result of Shearson's failure to provide permanent financing, and reduce that amount by 6.5 million dollars, or if the total damages [are] less than 6.5 million dollars, the Court will reduce Phenix Federal's recovery to zero. This is a matter for the Court and you must not give any consideration to the 6.5 million dollars in arriving at the amount of damages.

J.A. 258-59. Phenix did not lodge an objection to this instruction at trial.

The jury found that Phenix had been damaged in the amounts of $1.6 million on the original loan, $761,721 in foregone interest on that sum, $2,761,733 in principal and in-

terest for subsequent advances to Van Buren County Alcohol, and $25,000 in expenses in overseeing the operations of the plant. It found that Phenix had not proved that it would suffer any loss on the letter of credit issued in connection with the MTJ bond deal. Since the jury found Phenix's damages to total less than $6.5 million, the Court entered judgment for Phenix against Shearson for $0, just as it had instructed the jury it would.

Phenix understandably complains bitterly about its failure to recover a dime in the judgment. It makes legal arguments against the offset of the bond proceeds against its award, but we do not need to reach them, for Phenix failed to object to the jury instruction it finds offensive and has therefore failed to preserve the alleged error for review.[2]

Federal R. Civ. P. 51 states in part:

> No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

---

[2] Phenix argues that it appeals not from the instruction, but from the Court's action in entering judgment for an amount less than the verdict. The Court told the jury that it, the Court, would reduce the jury's damages verdict by $6.5 million. This, the argument runs, was not an explanation of the law made to guide the jury's deliberation, but a declaration of the Court's intent to offset the jury's verdict; thus it was not a "jury instruction."

We reject this argument. The instruction explained the law applicable to the case, as all jury instructions do. The Court instructed the jury that the law in this case required the offset, regardless of what it found Phenix's damages to be. If Phenix disagreed with this statement of the applicable law, it should have objected to the instruction.

We do recognize an exception to this rule in those rare cases where the alleged error "is plain error in the sense that a miscarriage of justice would otherwise occur." *Rowe International, Inc. v. J-B Enterprises, Inc.*, 647 F.2d 830, 835 (8th Cir. 1981). But we emphasize the extremely narrow scope of this rule in civil cases; it lies "in only those exceptional cases where the error has 'seriously affected the fairness, integrity or public reputation of judicial proceedings.' " *Morris v. Getscher,* 708 F.2d 1306, 1309 (8th Cir. 1983), quoting *Rowe International, supra,* at 835.

Phenix contends that a miscarriage of justice occurs for purposes of the plain-error rule whenever a party fails to receive substantially all that he is entitled to under the law, citing *Sheppard Federal Credit Union v. Palmer,* 408 F.2d 1369, 1372 (5th Cir. 1969). This happened here, it argues, because the jury found Phenix entitled to more than $5 million, and the Court entered judgment for $0. The flaw in this argument is evident: under the applicable law Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million. The jury found that Phenix had lost over $5 million on the loan to Van Buren County Alcohol, but had not proved that it would lose anything on the letter of credit. Therefore Phenix got exactly what it was entitled to.

Only if the statement of the applicable law contained in the jury instruction Phenix now complains of were egregiously wrong, and that statement produced a result substantially different from what would have resulted from a correct instruction, would we find plain error in this civil case. This did not happen here. The instruction at issue was, at worst, arguable, and it resulted at least in part from Phenix's own tactical position at trial. And in an adversarial system in which lawyers zealously represent their clients' interests, the occurrence, without objection, of an error gross enough, or a result skewed enough, to justify plain-error reversal in a civil case will be rare

indeed. If we were to recognize plain error as easily as appellant wishes, we would reduce the trial courts to the status of mere masters. This would be a disaster for the orderly administration of justice.

Finally, Phenix seeks to avoid the effect of Fed. R. Civ. P. 51 by asserting error in the Court's admission of evidence of the MTJ transaction. But it admits that it failed to object to that evidence and must resort to the plain-error doctrine on review. See Fed. R. Evid. 103; *Greger v. International Jensen, Inc.*, 820 F.2d 937 (8th Cir. 1987). Again, we find no plain error.[3]

The judgment is

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[3] We note that Phenix's counsel on appeal, who has urged the plain-error doctrine with great ingenuity, did not represent it at trial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 86-1407, 86-1408, 86-1409

On Appeal from the United States District Court
for the Southern District of Iowa.

No. 86-1407

Phenix Federal Savings & Loan Association, F.A.,
Appellant,

v.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Appellee.

No. 86-1408

Hansen-Friedrichsen, Inc.; Dallas County Alcohol;
Jerry Hansen; Yvonne Hansen; Haupert Livestock, Inc.;
and Donald E. and Eloise Haupert,
Appellants,

v.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Appellee.

On Appeal from the United States District Court
for the Southern District of Iowa.

No. 86-1409

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Appellant,

v.

Phenix Federal Savings & Loan Association, F.A.;
Hansen-Friedrichsen, Inc.; Dallas County Alcohol;
Jerry Hansen; Yvonne Hansen; Haupert Livestock, Inc.;
and Donald E. and Eloise Haupert,
Appellees.

Filed: September 9, 1988

Before McMILLIAN, ARNOLD, and BOWMAN,
Circuit Judges.

ORDER

This Court's initial opinion was filed on March 10, 1988. On May 3, 1988, a petition for rehearing en banc filed by Phenix Federal Savings & Loan Association was denied. Phenix's petition for rehearing by the panel is now denied. The amended opinion filed today does, however, take a somewhat different approach to the plain-error doctrine, which is the focus of Phenix's petition.

On May 27, 1988, prompted by a petition for rehearing by the panel filed by Shearson Loeb Rhoades, Inc., we entered an order inviting the Hansen and Haupert plaintiffs to respond to and comment on certain issues raised by the petition. These responses were filed on June 15, 1988.

Thereafter, Shearson and the Haupert plaintiffs informed us that they had settled all issues outstanding between them. The Hauperts moved to dismiss their appeal, and Shearson moved to dismiss its cross-appeal as against the Haupert plaintiffs. These motions are granted. Accordingly, in Nos. 86-1408 and 86-1409 the appeal of Haupert Livestock, Inc., Donald E. Haupert, and Eloise Haupert is dismissed, as is the cross-appeal of Shearson Loeb Rhoades, Inc., as against the Haupert plaintiffs.

We also have before us a request by the District Court that the case be remanded to it for the limited purpose of allowing it to rule on a motion for leave to intervene by Citizens State Bank, which claims an interest in the judgment in favor of the Hansen plaintiffs. We are today filing an amended and substituted opinion affirming that judgment. We direct that our mandate issue forthwith, and that the cause be remanded to the District Court at once. On remand, that Court will be free to rule on the motion to intervene.

The petition of Shearson Loeb Rhoades, Inc., for rehearing by the panel remains to be disposed of. The petition is granted. The judgment of this Court entered March 10, 1988, is vacated, and the opinion filed on that date is withdrawn. The Court is today filing an amended and substituted opinion disposing of all issues remaining in the case.

In Nos. 86-1407 and 86-1409, Shearson Loeb Rhoades, Inc., shall be awarded its costs against Phenix Federal Savings & Loan Association, F.A. Costs are awarded for the following items: one copy of the Joint Appendix and 14 copies of briefs totaling 117 pages, for a total award of $467.72. In Nos. 86-1408 and 86-1409, the Hansen plaintiffs are awarded their

costs. As between Shearson and the Haupert plaintiffs, each side shall bear its own costs.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Appeals from the United States District Court
for the Southern District of Iowa.

Nos. 86-1407 and 86-1409SI

Phenix Federal Savings and Loan Association,
Appellant/Cross-Appellee,

vs.

Shearson Loeb Rhoades, Inc., etc.,
Appellee/Cross-Appellant.

Petition for rehearing en banc filed by Phenix Federal Savings and Loan Association has been considered by the Court and is denied.

The petitions for rehearing filed by Phenix Federal Savings and Loan Association and Shearson Loeb Rhoades, etc., are still pending before the Court.

May 3, 1988

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JUDGMENT IN A CIVIL CASE

Case Number: 82-383-A

The Conrad Industries Corporation, et al,
Plaintiffs,

v.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Defendant.

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment notwithstanding the verdict is entered in favor of the particular plaintiff named below to alter the September 13, 1985, judgment as follows:

CONRAD INDUSTRIES:

In the amount of One Hundred Fifty-nine Thousand, Five Hundred Twenty-one Dollars and Thirty-seven Cents ($159,521.37) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

VAN BUREN COUNTY ALCOHOL:

In the amount of Two Million, Seven Hundred One Thousand, Eight Hundred Thirty-eight Dollars and Eighty-four

Cents ($2,701,838.84) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

LEONARD CONRAD:

In the Amount of One Hundred Two Dollars and Nineteen Cents ($102.19) plus post judgment interest from September 13, 1985, at the rate of 7.91% per annum.

CONRAD FARMS, INC.:

In the amount of Six Hundred Ninety-four Thousand, Six Hundred Seventy-five Dollars and Forty-seven Cents ($694,675.47) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

JERRY HANSEN and/or HANSEN-FRIEDRICHSEN, INC.:

In the amount of One Million, Three Hundred One Thousand, Six Hundred Sixty-seven Dollars and Thirty-five Cents. ($1,301,667.35) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

HANSEN-FRIEDRICHSEN, INC.:

In the amount of Two Hundred Ninety-five Thousand, Twenty-seven Dollars and Twenty-three Cents ($295,027.23) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

JERRY HANSEN:

In the amount of Twenty-six Thousand, Four Hundred Twenty-eight Dollars and One Cent ($26,428.01) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

DONALD E. HAUPERT and/or HAUPERT LIVESTOCK, INC.:

In the amount of Two Hundred Fifty-four Thousand, One Hundred Twenty Dollars and Thirty-one Cents ($254,120.31) plus post-judgment interest from September 13, 1985, at the rate of 7.91% per annum.

PHENIX FEDERAL SAVINGS AND LOAN:

Judgment in favor of Phenix against Shearson for $0.

Costs are awarded to all plaintiffs.

Date: February 28, 1986

James R. Rosenbaum
Clerk

/s/ Shirley Dooley
(By) Deputy Clerk

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Law No. 82-383-A

ORDER FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Conrad Industries Corporation, et al,
Plaintiffs,

vs.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Defendant.

On September 13, 1985, the Court entered an Order for Judgment upon the jury's answers to special interrogatories and the clerk entered judgment thereon. Thereafter, various post-trial motions were filed by the parties and came on for oral argument on January 10, 1986.

On January 16, 1986, the Court entered a Ruling and Order on post-trial motions. The Court now enters the following Order for Judgment Notwithstanding the Verdict in accordance with the January 16, 1986 rulings of the Court on the post-trial motions.

CONRAD INDUSTRIES

Judgment was entered on the amount of the jury's breach of contract award to Conrad Industries of $419,000 as general damages on the interest differential between the interest rate that would have been paid had 4.2 million dollars been received from the sale of industrial bonds and the interest it has paid or presently owes to its suppliers, $156,000 as consequential

damages on the interest differential incurred by Conrad Industries on amounts owed in excess of 4.2 million dollars, and $100 for expenses. The same awards were made on the theory of negligent misrepresentation. The negligent misrepresentation amount must be reduced by the 35% comparative negligence of Conrad Industries.

In accordance with the January 16, 1986 ruling of this Court, the award of $419,000 for general interest differential damages is vacated. Judgment notwithstanding the verdict shall be entered in favor of Conrad Industries for $156,000 as consequential interest differential damages and $100 for expenses, for a total of $156,100. Prejudgment interest at 10% will be allowed from the June 25, 1985 jury verdict to the September 13, 1985 judgment.

VAN BUREN COUNTY ALCOHOL (VBCA)

Judgment was entered on the amount of the jury's breach of contract award to VBCA of $100 in general interest differential damages, $100 in consequential interest differential damages, $715,221 for operating losses for 1982, $1,402,386 for operating losses for 1983, $564,700 for lost profits for 1982, $647,300 for lost profits for 1983, $149,525 for costs and expenses, and $1,200,000 for loss of credit reputation. Except for lost profits which was not submitted as an element of damages, the same awards were made on the theory of negligent misrepresentation. The negligent misrepresentation amount must be reduced by the 39% comparative negligence of VBCA.

The awards for 1982 and 1983 lost profits and for credit reputation are vacated. Judgment notwithstanding the verdict shall be entered in favor of VBCA as follows: $100 for general interest differential; $100 for consequential interest differential; $715,221 for 1982 operating losses; $1,402,386 for 1983 operating losses; and $149,525 for costs and expenses, for a total of $2,267,332.

Prejudgment interest is awarded at 10% from the date set forth below to the September 13, 1985 judgment.

Operating loss

on $715,221 from January 1, 1983.

on $1,402,386 from January 1, 1984.

Costs and expenses

on $149,525 from June 25, 1985

Interest differential

on $200 from June 25, 1985.

LEONARD CONRAD

Judgment was entered on the amount of the jury's breach of contract award to Leonard Conrad of $3,000,000 for loss of credit reputation and $100 for costs and expenses. The same awards were made on the theory of negligent misrepresentation. The negligent misrepresentation amount must be reduced by the 42% comparative negligence of Mr. Conrad.

The $3,000,000 award for credit reputation damages is vacated. Judgment notwithstanding the verdict shall be entered for Leonard Conrad for $100 for costs and expenses. Prejudgment interest at 10% is allowed from June 25, 1985 to the September 13, 1985 judgment.

CONRAD FARMS, INC.

Judgment was entered on the amount of the jury's breach of contract award to Conrad Farms, Inc. of $500,000 for loss of credit reputation, $100 for costs and expenses, and a total of $520,695 for loss in the value of equity in farmland. The same amount was awarded on the theory of negligent misrepresentation and must be reduced by 40% comparative negligence.

The $500,000 award for loss of credit reputation is vacated. Judgment notwithstanding the verdict shall be entered in favor of Conrad Farms, Inc. for $100 for costs and expenses and $520,695 for loss in the value of equity in farmland, for a total of $520,795. In addition, prejudgment interest at 10% shall be allowed from the date set forth below to the September 13, 1985 judgment.

$100 expenses from June 25, 1985.

$384,016 for loss of equity from May 4, 1982.

$136,679 for loss of equity from June 4, 1982.

JERRY HANSEN and/or HANSEN-FRIEDRICHSEN, INC.

Judgment was entered on the amount of the jury's breach of contract award to these plaintiffs of $1,731,433.77 on a judgment against them and in favor of Citizens State Bank, $515,244 on a debt owed Citizens State Bank, and $27,875 for costs and expenses incurred as a result of Shearson's conduct. These same awards were made on the theory of negligent misrepresentation. The jury found Jerry Hansen 44% comparatively negligent and Hansen-Friedrichsen 37%. As Jerry Hansen acted for Hansen-Friedrichsen, the corporation is bound by Mr. Hansen's conduct and the negligent misrepresentation award must be reduced by 44%.

The verdict in favor of these plaintiffs for breach of contract is vacated. Judgment notwithstanding the verdict shall be entered in favor of these plaintiffs on the theory of negligent misrepresentation for $969,602.91 on the Citizens State Bank judgment against them, $288,536.64 for the debt owed by these plaintiffs to Citizens State Bank, and $15,610 for costs and expenses, for a total of $1,273,749.55. These amounts include the reduction for comparative negligence. Prejudgment interest at 10% is awarded from June 25, 1985 to the September 13, 1985 judgment.

HANSEN-FRIEDRICHSEN, INC.

Judgment was entered on the amount of the jury's breach of contract award to Hansen-Friedrichsen of $488,553.18 for loss of equity in farmland as of December 1, 1984. The same amount was awarded on the negligent misrepresentation theory and must be reduced by the 44% comparative negligence attributable to Hansen-Friedrichsen.

Because the breach of contract verdict in favor of Hansen-Friedrichsen is vacated, judgment notwithstanding the verdict shall be entered in favor of Hansen-Friedrichsen, Inc. on the negligent misrepresentation theory for $273,589.78 for loss of equity. This amount includes the reduction for comparative negligence. Prejudgment interest at 10% shall be awarded from December 1, 1984 to the September 13, 1985 judgment.

JERRY HANSEN

Judgment was entered on the amount of the jury's breach of contract award to Jerry Hansen of $1,000,000 for loss of credit reputation and $38,000 for advances made for interim financing. The jury awarded Jerry Hansen $38,000 for interim financing advances but did not award damages for loss of credit reputation on the negligent misrepresentation theory. The negligent misrepresentation amount must be reduced by the 44% comparative negligence of Jerry Hansen.

The loss of credit reputation damages and the breach of contract verdict in favor of Jerry Hansen are vacated. Judgment notwithstanding the verdict shall be entered in favor of Jerry Hansen on the negligent misrepresentation theory for $21,280 for advances made for interim financing. This amount includes the reduction for comparative negligence. Prejudgment interest at 10% is awarded from April 13, 1983 to the September 13, 1985 judgment.

DONALD E. HAUPERT AND HAUPERT LIVESTOCK

Judgment was entered on the amount of the jury's breach of contract award to these plaintiffs of $524,698 as the amount due, including interest, on a note for $200,000 held by the Federal Deposit Insurance Corporation. The same amount was awarded for negligent misrepresentation. Donald Haupert's comparative negligence was fixed at 40% and Haupert Livestock's at 37%. Because Donald Haupert is the sole representative of Haupert Livestock, the negligent misrepresentation amount must be reduced by 40% comparative negligence.

The breach of contract verdict in favor of these plaintiffs is vacated. In addition, the amount of the award is reduced to $414,450.03 to reflect 18% interest accruing on the note held by the FDIC. Judgment notwithstanding the verdict shall be entered in favor of these plaintiffs on the negligent misrepresentation theory for $248,670.01 as the amount due on the note held by the FDIC. This amount includes the reduction for comparative negligence. Prejudgment interest at 10% shall be allowed from June 25, 1985 to the September 13, 1985 judgment.

PHENIX FEDERAL SAVINGS AND LOAN

The jury found in favor of Phenix on both the theories of negligent misrepresentation and promissory estoppel. The jury found no negligence on the part of Phenix. Damages were awarded as follows:

Loan	$1,600,000
Interest on loan	761,721
Advancement	1,629,890
Interest on advancements	1,131,843
Overseeing plant	25,000
	$5,148,454

Phenix has already received $6,500,000 from the proceeds of an industrial bond issue. The jury has determined that Phenix

will not be required to pay any money on its contingent guarantee. In accordance with Damage Instruction No. 41, Phenix, while prevailing, is entitled to recover nothing from Shearson. On September 13, 1985, judgment was entered in favor of Phenix for $0. In accordance with the January 16, 1986 ruling of this Court, the portion of the September 13, 1985 judgment entered in favor of Phenix is not altered in any manner and remains as entered.

IT IS THEREFORE ORDERED that the Clerk of the Court is authorized and directed to enter judgment notwithstanding the verdict against the defendant and in favor of the particular plaintiff named below to alter the September 13, 1985 judgment so that the judgment is now as follows:

Conrad Industries:

$159,521.37 plus post-judgment interest.

Van Buren County Alcohol:

$2,701,838.84 plus post-judgment interest.

Leonard Conrad:

$102.19 plus post-judgment interest.

Conrad Farms, Inc.:

$694,675.47 plus post-judgment interest.

Jerry Hansen and/or Hansen-Friedrichsen, Inc.:

$1,301,667.35 plus post-judgment interest.

Hansen-Friedrichsen, Inc.:

$295,027.23 plus post-judgment interest.

Jerry Hansen:

$26,428.01 plus post-judgment interest.

Donald E. Haupert and/or Haupert Livestock, Inc.:

$254,120.31 plus post-judgment interest.

Phenix Federal Savings and Loan:

Judgment in favor of Phenix against Shearson for $0.

Costs shall be awarded to all plaintiffs.

Signed this 28 day of February, 1986

/s/ W. C. Stuart, Judge
Southern District of Iowa

Approved as to form:

/s/ Thomas S. Reavely
1040 Des Moines Building
Des Moines, Iowa 50309

/s/ Kenneth L. Funderburk
131 Broad Street
P.O. Box 1025
Phenix City, Alabama 36868-1025

/s/ James B. Smith
P.O. Box 487
Perry, Iowa 50220

/s/ David P. Miller
P.O. Box 126
Libertyville, Iowa 52567

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Civil No. 82-383-A

RULING AND ORDER
ON
POST-TRIAL MOTIONS

The Conrad Industries Corporation, et al.,
Plaintiffs,

vs.

Shearson Loeb Rhoades, Inc., k/n/a
Shearson/American Express, Inc.,
Defendant.

All post-trial motions filed by the parties in the above-entitled action came on for oral argument January 10, 1986. Appearances are noted in the clerk's minutes for that date. As the Court had spent several days preparing for the oral arguments, and as it is important that the case, trial of which began almost exactly a year ago, be moved along and as the Court has previously commented on many of the issues raised, the Court will limit its comments to those issues that have been the most troublesome throughout this case.

SHEARSON'S MOTION FOR JUDGMENT N.O.V. AND FOR NEW TRIAL

I. CONTRACT CAUSE OF ACTION

A. STANDING

Shearson first argues that no plaintiff, other than Conrad Industries, has standing to bring a breach of contract action

against Shearson. Two theories were advanced by the plaintiffs to give them standing, agency and third-party beneficiary. The jury determined that Leonard Conrad when he accepted the December 1, 1980 letter as president of Conrad Industries, was acting as agent for all of the plaintiffs, except the spouses, and therefore, the jury did not reach the third-party beneficiary claim.

Insofar as the Conrad plaintiffs are concerned, they are all Leonard Conrad wearing different hats. Leonard Conrad was the prime and only actor for these plaintiffs. As Conrad Industries he was to build the plant, which as a practical matter, he would own and run as Van Buren County Alcohol. Security for the transactions was provided by Conrad Farms and Leonard Conrad gave his personal guarantee. Shearson was aware that Leonard Conrad was using his various corporate bodies to accomplish his purpose. There was abundant evidence in the record from which the jury could find that when Leonard Conrad signed the contract as president of Conrad Industries, he was acting as agent for himself and his other corporate entities.

Insofar as the Haupert and Hansen plaintiffs are concerned, the question of agency and standing is another matter. The Court ruled, as a matter of law, that no causes of action concerning the Jefferson County Alcohol Plant or the Perry Alcohol Plant should be submitted to the jury because the conditions precedent to any obligation on the part of Shearson to provide permanent financing had not been fulfilled. The jury could very well have found that Leonard Conrad was acting as agent for the Hauperts and Hansens in connection with those two plants had issues relating to them been submitted to the jury. Those plants were never constructed and the decision to delay construction was for reasons unconnected with the claims against Shearson. Because of the difficulty in obtaining interim financing, for which Shearson had no responsibility, the plaintiffs decided to proceed first with the Van Buren County

Alcohol plant. This decision was made after December 1, 1980. The involvement of the Hauperts and Hansen with the Van Buren County Alcohol plant was for reasons of their own. I do not believe that the evidence presented in connection with this issue manifested authority from the Hansens and Hauperts for Conrad to act as agent for them in connection with the issues involved in this lawsuit or that Conrad, as agent consented to act for them in connection with the Van Buren County Alcohol plant.

Although the jury was not required to make a decision on the third-party beneficiary issue, the Court believes, for the reasons set out above, that as a matter of law, neither the Hansens nor the Hauperts were entitled to have the third-party beneficiary question submitted to the jury. A factual issue was created as to the Conrad plaintiffs, but the jury's verdict on the agency issue stands.

Therefore, the Court believes that Shearson's motion for Judgment Notwithstanding the Verdict on the Standing Issue should be granted as to the Hansen and Haupert plaintiffs and denied as to the Conrad plaintiffs.

As a result these plaintiffs had no standing to urge a breach of contract claim against Shearson and Shearson is entitled to judgment notwithstanding the verdict against the Hansen and Haupert plaintiffs on that claim.

B. DECEMBER 1, 1980 LETTER NOT A CONTRACT TO PROVIDE PERMANENT FINANCING.

Shearson next argues that the December 1, 1980 letter alleged to be a contract providing permanent financing failed to include the terms that are essential in order to form such a contract. Shearson claims that at most, it was a contract to submit a proposal to finance. The Court has had reservations about the viability of the contract cause of action from the beginning. Many of the provisions ordinarily included in a contract were

missing from the December 1, 1980 letter. The following provision is included in that letter.

> When such market level has been established to our satisfaction a proposal to purchase the proposed issues shall be submitted in writing, including, among other things, the rate or rates of interest on the bond or notes and the price to be paid therefor. Upon acceptance of the proposal to purchase by the company, said acceptance shall constitute the sale of the debt financing to Shearson-Loeb-Rhoades.

This provision sounds more like the December 1, 1980 letter is a letter of intent to make a proposal to offer financing than a letter of agreement to finance. If the evidence were limited to the terms of the letter itself, the Court would have serious doubts as to whether it was sufficient as a matter of law to make a binding contract to provide financing. However, there is evidence concerning surrounding circumstances, including the conduct of the parties which, in the Court's opinion, would support a jury's finding that the parties considered this to be a binding contract to provide funding, if Conrad Industries satisfied the conditions precedent, and treated it as such.

C. FAILURE TO COMPLY WITH CONDITIONS PRECEDENT.

Shearson also urges that the plaintiffs failed to present the requisite evidence of compliance with all of the conditions precedent.

The Court would have had, as trier of the fact, considerable difficulty in finding that the conditions precedent to a binding commitment on the part of Shearson for permanent financing had been met by December 31, 1981. The Court would have had particular difficulty finding that the condition requiring the plant "to operate as specified" was satisfied until after major modifications had been made in 1982. There was evidence that

between August and October 1981 the plant was still in the shakedown phase. At that time major problems remained with the boiler and the final two distilling columns. However, the Court believes that there is evidence from which a jury could have found that the conditions had been met and that Shearson considered that the conditions were met. A fact question for the jury's determination was raised. The Court therefore denies Shearson's motion for judgment notwithstanding the verdict on this ground.

The Court believes that the failure to meet these conditions had little or no influence upon Shearson's decision not to furnish permanent financing. Shearson had determined long before December 31, 1981 that it did not want to get involved in financing ethanol alcohol plants. Mr. Capello had been employed principally because of his expertise in this field and his departure signalled a change in the attitude of Shearson concerning the financing of this industry.

II. NEGLIGENT MISREPRESENTATION CAUSE OF ACTION

Shearson urges that the evidence does not support a finding of liability for negligent misrepresentation in favor of any of the plaintiffs. In the Court's opinion there is abundant evidence to support the jury's finding on this issue. Mr. Capello representing Shearson made many statements concerning Shearson's willingness to provide permanent financing for the Van Buren County Alcohol plant. The jury could have found such assurances were negligently made and intended to be conveyed to the plaintiffs and that all of the plaintiffs acted in reliance thereon. Shearson's motion for judgment notwithstanding the verdict or in the alternative for a new trial on the negligent misrepresentation liability cause of action is denied.

III. DAMAGES - CONRAD PLAINTIFFS

Shearson also takes issue with the damage awards to the Conrad plaintiffs. The jury's response to Interrogatory No. 1 on the breach of contract claim awarded Conrad Industries $419,000 as general damages for interest differential. Counsel for that plaintiff concedes that no such damages were established and that Shearson is entitled to Judgment N.O.V. on that item of damages. There are two other troublesome areas insofar as damages are concerned, (A) the loss of profits to Van Buren County Alcohol, and (B) the loss of credit reputation as a proper element of damages.

A. LOSS OF PROFITS TO VAN BUREN COUNTY ALCOHOL.

In deciding whether the loss of profit is a proper element of damages to be submitted in connection with the Van Buren County Alcohol claim, the Court has examined *Harsha v. State Savings Bank,* 346 N.W. 2d 791 (Iowa, 1984). The Iowa Supreme Court in its opinion in that case recognized the new business rule as not being absolute and that evidence of future profits should be admitted if it provides a reasonable basis for computing lost profits. The court stated that the basic question was whether lost profits had been shown with reasonable certainty. It also recognized that *Harsha* presented a close question as to whether lost profits should have been submitted to the jury. There are several factual differences in this case and all of them tend to favor Shearson. First, the ethanol-alcohol fuel industry was a new industry at the time involved with little history of profitability. Second, the plant being constructed was of a minimum size to make the project economically viable and there was no history of profitability for a plant of this size. Third, plaintiff's expert based his opinion as to profitability primarily on a preliminary pro forma projection which he determined to be reasonable. He did not take into consideration any actual operating data or the problems encountered with the plant. The

expert based his opinion on established technology with which he was familiar and did not take into consideration the fact that new technology was being used in this plant. Fourth, plaintiff's expert engineer, Mr. Bosworth, had a great deal of experience in the production of beverage alcohol, but he did not have experience in attempting to break the azeotrope to further reduce the water content. The pressure and vacuum columns that he designed were new technology that had not been used before in connection with this kind of a plant and they were replaced. Fifth, this was Mr. Conrad's first venture with a production model ethanol-alcohol plant.

The Court believes that the application of the principles stated in the *Harsha* case by the Supreme Court of Iowa, when applied to the facts here requires the Court to find, as a matter of law, that the evidence fails to show, with reasonable certainty, a prospective loss of profits and this element of damages should not have been submitted to the jury.

B. LOSS OF CREDIT REPUTATION.

The last issue that has created considerable difficulty throughout the trial is the loss of credit reputation as an element of damages. This is extremely important to the parties because of the size of the damage awards and the fact that it is an element of recovery in both causes of action. There are no Iowa cases deciding whether the loss of credit reputation is a proper element of damages under breach of contract or negligent misrepresentation. In *Peterson v. Farmers Casualty Co.*, 226 N.W. 2d 226, 231 (Iowa 1975), the Iowa Supreme Court passed this issue. Although the Iowa Supreme Court might recognize a cause of action for loss of credit reputation under some circumstances, it is doubtful whether the Iowa Supreme Court would recognize loss of credit reputation as an element of damage in the absence of proof of malice or reckless disregard. Even if it did not require malice, the Supreme Court would require evidence of tangible pecuniary loss resulting from the loss

of credit reputation. Conrad plaintiffs seem to concede that evidence of pecuniary loss would be required and refer to evidence they have offered as establishing a tangible pecuniary loss. The evidence referred to supported other claims of damages and therefore would be duplicative. The Conrad plaintiffs do not point to any other specific instances in which they claim to have suffered a pecuniary loss because they were denied credit because of the loss of credit reputation. The evidence referred to and discussed by the plaintiffs in their briefs is not the evidence that would satisfy the tangible pecuniary loss requirement. Under the evidence presented here loss of credit reputation should not have been submitted to the jury. Even if damages for loss of credit reputation were recoverable under these facts, the allowance of damages for such loss to Leonard Conrad, Conrad Farms, Inc. and Van Buren County Alcohol are duplicative because they are all Leonard Conrad wearing different hats. The maximum recovery for Conrad plaintiffs in any event should not exceed three million dollars.

C. PROXIMATE CAUSE - BUSINESS LOSSES AND VAN BUREN COUNTY ALCOHOL LOST PROFITS.

Shearson also urges that Van Buren County Alcohol failed to introduce evidence that the problems on which it blamed its operating difficulties were substantially caused by Shearson or that the lack of permanent financing caused the plant's poor financial performance.

The jury apparently had no difficulty in concluding that Shearson's failure to furnish permanent financing did cause the operating loss and the loss of profits. There is evidence in the record to support the jury's finding of causal connection between Shearson's action and operating loss. The Court has already determined that lost profits were too speculative under the *Harsha* case to be submitted to the jury. As trier of the fact the Court would probably not have arrived at the same decision

as the jurors. Several problems were encountered by Van Buren County Alcohol that could have resulted in an operating loss that were not related to any conduct on the part of Shearson, including,

1, the fact that the plant cost one-third more than estimated,

2, the lack of interim financing arrangements to cover that increased cost,

3, the lack of technical information necessary to break the azeotrope,

4, the failure of the vacuum and pressure columns to function properly,

5 the problems with the boiler.

6, the problems with the conveyor system,

7, the general loss of interest of the public in fuel alcohol,

8, the lower price of gasoline,

9, the higher price of corn,

10, the lower price of alcohol,

11, the lower price of DDG,

12, the size of the plant in an industry where economy of size is important,

13, higher interest rates,

14, the lowering of agricultural land values,

15, the reduction in consumption of gasoline,

16, the problems with the coal,

17, the problems with the lime.

However, the Court believes there was sufficient other evidence in the record to support the jury's answers.[1]

IV. DAMAGES - HANSEN PLAINTIFFS

A. LOSS OF CREDIT REPUTATION.

Shearson makes the same arguments concerning the loss of credit reputation urged in connection with the Conrad plaintiffs. In its answer to Interrogatory No. 16 under damages for breach of contract, the jury awarded Jerry Hansen $1,000,000 for such loss. No award was made in his favor for loss of credit reputation under the negligent misrepresentation cause of action. As the Court has already determined that Mr. Hansen was not entitled as a matter of law to have his contract cause of action submitted to the jury, the award for loss of credit reputation must fall. Even if the contract cause of action had been properly submitted to the jury, the award of loss of credit reputation on that claim would also have to have been set aside for the reasons stated by the Court in connection with the loss of credit reputation damages awarded to the Conrad plaintiffs.

The awards of damages to Jerry Hansen and/or Hansen-Fredrichsen under Interrogatories 9, 10, 11 and 12 in the special interrogatories on breach of contract claims must also be disallowed under the Court's rulings.

The remainder of Shearson's motions relating to the damages awarded the Hansen plaintiffs is denied. The Court is of the opinion that there was sufficient evidence on the remaining issues to raise a fact question for the jury's determination.

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[1] The jury recognized that there were causes in addition to Shearson's failure to furnish permanent financing by assigning a substantial percentage of fault to the various plaintiffs.

V. DAMAGES - HAUPERT PLAINTIFFS

The Court has already determined that there was sufficient evidence to submit the negligent misrepresentation claim of the Haupert plaintiffs to the jury. In addition Shearson argued that the interest rate used by the jury and adopted from the jury decision is too high. The Court is of the opinion that under the evidence presented the proper rate of interest on the amount owed to FDIC is 18%. The jury awarded the Hauperts $524,600.98. The amount that would have been awarded at the rate of 18% was $414,450.03. The Court therefore believes that as a matter of law Shearson's motion for judgment notwithstanding the verdict should be granted to reduce the award to the Haupert plaintiffs to $414,453.03.

In Shearson's motion for relief from judgment or new trial which will be discussed later, Shearson claims that as Donald Haupert was the sole representative of Haupert Livestock in these transactions, the percent of comparative negligence to be applied under the negligent misrepresentation claim should be that of Donald Haupert (40%) rather than that of Haupert Livestock, Inc. (37%). The Court agrees. The Court took this position in connection with the Hansen plaintiffs. Therefore, as the contract awards have been set aside, the verdict in favor of the Haupert plaintiffs in the amount of $414,450.03 should be reduced by 40%.

In summary, the Court believes that it would be helpful to all concerned if the Court's rulings on Shearson's motion for judgment N.O.V. and in the alternative for new trial were related to the special interrogatories and the jury's response thereto.

SPECIAL INTERROGATORIES RELATING TO LIABILITY ON BREACH OF CONTRACT CLAIMS

Interrogatory No. 3, Schedule I

The "yes" answers relating to the Conrad plaintiffs shall remain as returned by the jury. As the Court has determined, as a

matter of law, that neither the Hansen nor Haupert plaintiffs had standing to pursue a cause of action for breach of contract on either the agency or third party beneficiary theories, the jury's "yes" answers for Jerry Hansen, Hansen-Fredrichsen, Inc., Donald Haupert and Haupert Livestock, Inc. must be set aside. This question should not have been submitted to the jury for the Hansens or Hauperts.

Interrogatory No. 4, Schedule II

The jury was not called upon to answer this interrogatory because of the jury's finding on the agency question. However, the Court has determined that the third-party beneficiary claims of the Hansen and Haupert plaintiffs should not have been submitted to the jury in any event. Therefore, the question contained in Schedule II should not have been submitted to the jury in connection with the Hansen and Haupert plaintiffs.

Interrogatory No. 5

For the reasons stated in connection with Interrogatory No. 3 above, this question should not have been submitted to the jury insofar as the Hansen and Haupert plaintiffs are concerned.

SPECIAL INTERROGATORIES ON BREACH OF CONTRACT CLAIMS FOR DAMAGES

Interrogatory No. 1

Counsel for Conrad Industries concedes that there is no evidence in the record to support an award of interest rate differential as general damages to Conrad Industries. As a matter of law, the answer to this interrogatory should have been "No" and the space for the amount of damages should have been left blank. Shearson's motion for judgment N.O.V. is granted as to this element of damages.

Interrogatory No. 6

The Court has determined that lost profits were not a proper element of damages for the Van Buren County Alcohol plant under the new business rule and these facts and circumstances. Shearson's motion for judgment N.O.V. on this damage element is granted. The damages awarded by the jury for the years 1982 and 1983 in the amounts of $564,700 and $647,300 respectively are disallowed.

Interrogatories 9, 10, 11, 12 and 13

These interrogatories relate to damages for the Hansen and Haupert plaintiffs on the contract theory. As the Court has previously held that they had no standing to urge a breach of contract claim against Shearson, the jury's answers to these special interrogatories must be set aside and the damages awarded thereunder disallowed.

Interrogatory No. 15

That portion of interrogatory No. 15 awarding damages to Jerry Hansen and/or Hansen-Fredrichsen, Inc. in the amount of $27,875 must be set aside for the same reason.

Interrogatory No. 16

The award of damages for loss of credit reputation to Van Buren County Alcohol, Leonard Conrad, Conrad Farms and Jerry Hansen must also be set aside as the Court has determined that loss of credit reputation is not a proper element of damages under these circumstances.

All other grounds for Judgment N.O.V. urged by Shearson and not specifically discussed are denied.

Shearson's alternative motion for new trial is denied in its entirety.

SHEARSON'S MOTION FOR NEW TRIAL, RELIEF FROM JUDGMENT AND TO AMEND, MODIFY OR CORRECT THE JUDGEMENT

I. Relief from Judgment - Southeast Bank cannot collect.

Iowa Code Section 615.1 provides that no judgment in an action for the foreclosure of a real estate mortgage shall be enforced or given any force or vitality after two years from the entry of the judgment. The Hansen plaintiffs seek to recover the amount of the judgment with interest entered against them September 13, 1983 in a foreclosure action brought by Citizens State Bank on behalf of the Iowa Southeast Bank consortium. Foreclosure was ordered but no sheriff's sale took place. The jury verdict returned in this case June 25, 1985 awarded the Hansen plaintiffs $1,731,433.77 on that element of damages.

Shearson seeks relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, or a new trial and to correct, modify and amend the judgment pursuant to Rule 59(a) and 59(e). Shearson claims that because of this special statute of limitations the Hansens need not pay the Citizen State Bank judgment and that they are not entitled to judgment against Shearson when the award would give the Hansens a windfall. Shearson cites the familiar rule that the ultimate purpose of compensatory damages is to place the injured party in as favorable position as though no wrong had been committed. *Dealers Hobby, Inc. v. Marie Ann Linn Realty,* 255 N.W. 2d 131, 134 (Iowa 1977).

The Court has considerable doubt whether Shearson, as a third party, is in a position to claim that the Hansens' were not damaged because of a statute of limitations which the Hansens may or may not invoke. In addition, it is questionable whether, because of the activities and negotiations that took place after the judgment was entered, the statute would be applied. Finally, the claim injects additional complex issues that, in the Court's opinion, should not be resolved at this stage of this litigation.

Shearson's motion for relief from judgment on the ground that the Southeast Banks cannot recover from Hansen is denied.

II. Newly Discovered Evidence - Jerry Hansen's Conduct.

Shearson claims that after the evidence was closed and while they were negotiating with the Citizens State Bank in an effort to limit its exposure under the Hansen claims, it learned from the Bank's file that Jerry Hansen and the Bank had entered into a written agreement on April 26, 1985 under which he received an option to purchase back his farm, subject to the mortgage to Connecticut General Life Insurance Company, for $304,000. This agreement followed an order from the Dallas County District Court evicting the Hansens from possession of the farm. In the agreement Mr. Hansen waived his right to appeal from that order. He agreed to vacate the home after the 60 day period had expired if the option were not exercised.

During the damage phase of the case, Jerry Hansen testified on direct examination as follows:

> Q. And so the eviction action was started in January of 1984?
>
> A. '85.
>
> Q. Or '85, excuse me. Is there any way, Mr. Hansen, that you can get the house and farm back?
>
> A. Only if I can pay off the debt.
>
> Q. All right. And have they told you how much it would take to get the farm and the house back?
>
> A. Yes, they have.
>
> Q. And how much is that?
>
> A. 2,243,255.

Evidence in this case was closed June 7, 1985 at which time the option had 19 more days to run.

Shearson claims that failure to produce the agreement during trial coupled with the quoted testimony entitles it to the relief sought under Fed. R. Civ. P. 60(b)(3) which provides for relief from judgment for fraud, misrepresentation or other misconduct of the adverse party. It also seeks a new trial under Fed. R. Civ. P. 59(a) based on newly discovered evidence.

Mr. Hansen claims that as he had no way to get $304,000, the option was only a device to keep possession of the house for 60 days during which he might be able to find a buyer who would permit him to remain on the farm as a tennant. This is his explanation as to why he did not mention the $304,000 option in his testimony and why he did not inform trial counsel about the April 26, 1985 agreement. The Court accepts Mr. Hansen's explanation. As the April 26, 1985 agreement did not cancel the indebtedness, Mr. Hansen had little to gain by purchasing the farm in view of his continuing obligation to the Bank. It is understandable why he might have believed that he had no opportunity to get the farm and house back for $304,000. From a tactical standpoint it is unlikely that Shearson would have benefitted from cross-examination in this area. This explanation from the witness stand could have been more damaging than the cross-examination helpful.

However, the Court is still troubled. This evidence was offered in a highly emotional situation and, in the Court's opinion, must have had a substantial impact on the jury's consideration of damages due to the Hansens' indebtedness to the Bank. Shearson by not being furnished a copy of the April 26 agreement was deprived of the opportunity to decide for itself the best trial tactics. In addition, this evaluation of the Bank's equity interest was relevant evidence on the issue of the amount of loss of farm equity. The failure to disclose this evidence might well have hampered Shearson's full and fair presentation of its case.

Under Rule 60(b)(3) one who asserts that an adverse party has obtained a verdict through fraud, misrepresentation or other

misconduct has the burden of proving such conduct by clear and convincing evidence. Such conduct must have prevented the losing party from fully and fairly presenting his case or defense. Rule 60(b)(3) applies to misconduct in withhholding information called for by discovery, but does not require that the information withheld be of such nature as to alter the result in the case. "This subsection of the Rule is aimed at judgments which are unfairly obtained, not at those which are factually incorrect." *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978); *Square Construction Co. v. Washington M.T.A.*, 657 F.2d 68, 71 (4th Cir. 1981); *Stridiron v. Stridiron*, 698 F.2d 204, 207 (3rd Cir. 1983). "The Court must balance the competing policies favoring the finality of judgments and justice being done in view of all the facts, to determine within its discretion, whether relief is appropriate in each case." *Square Construction Co., supra*, 657 F.2d at 71.

This was an unusually long, complex trial. The jury spent 18 days in deliberation. Granting Shearson's motion on this ground would mandate a new trial. Mr. Hansen's testimony as to the amount owed to the bank is accurate. The Court does not believe that Mr. Hansen committed fraud or intentionally misrepresented the facts concerning the option. In view of the time limit on the option and his financial condition, it may not have been a misrepresentation to say he would have to pay the entire indebtedness before he could get his farm back. On the other hand, this was relevant discoverable evidence that should have been produced for Shearson's use at trial. It is not likely that this evidence would have altered the jury's answers. An appeal in this matter is inevitable and the Eighth Circuit Court of Appeals will be in a position to dispose of this issue. Under all the facts and circumstances of this case, the Court finds that considerations of finality outweigh the policy of deterring misconduct which threatens the fairness and integrity of the fact finding process.

Shearson's motion for relief from judgment or new trial on this ground is denied.

III. Hansen's Surprise Expert Testimony.

Mr. Melton an expert on real estate evaluation during discovery stated that his testimony would relate to the Conrad properties. At trial the Court permitted him to express his opinion that in December, 1981, the Hansen property was worth $3,500 an acre. He had not been asked to express an opinion on the value of the Hansen property until that morning. The Court overruled objections to the foundation. Thereafter Shearson moved to strike the testimony because it had no opportunity for meaningful discovery and the valuation exceeded the amount of $600,000 claimed as loss of farm equity in an interrogatory. The Court let the testimony stand and stated that he would reduce any jury award which exceeded $600,000 for the equity in the Hansen farm to $600,000. The Court determined that the correct date for the evaluation of the farm land was December 1, 1984 rather than December, 1981. The jury verdict on this item of damages was $488,553.18.

In the Court's opinion, if the Court erred in failing to strike the Melton testimony in regard to the Hansen equity, the jury verdict made it harmless error.

Shearson's motion for relief from judgment or new trial on this ground is denied.

SHEARSON'S MOTION TO AMEND JUDGMENT

Shearson's motion to amend judgment filed September 27, 1985 is denied.

MOTION FOR EQUITABLE RELIEF AGAINST CONRAD PLAINTIFFS

Shearson's motion for equitable relief against Conrad plaintiffs filed September 23, 1985 is denied.

MOTION TO AMEND JUDGMENT FILED BY CONRAD PLAINTIFFS

The Conrad plaintiffs motion to amend Judgment filed September 20, 1985 relating to prejudgment interest is denied for the reasons stated orally when the matter was discussed during trial.

MOTION TO AMEND JUDGMENT OR IN THE ALTERNATIVE, MOTION FOR NEW TRIAL (PHENIX-FEDERAL SAVINGS & LOAN ASSN)

The motion of Phenix-Federal Savings & Loan Association to amend Judgment or in the alternative motion for new trial filed September 23, 1985 is denied for the reasons stated in Shearson's resistance filed October 9, 1985.

IT IS THEREFORE ORDERED that counsel for Shearson shall prepare an Order for Judgment Notwithstanding the Verdict in accordance with the Rulings of the Court on these post-trial motions. Said Order shall be submitted by Shearson to counsel for the plaintiffs for their approval as to form.

Said Order should include a correction of the $100,000 mathematical error made in totalling the award to Jerry Hansen and/or Hansen-Fredrichsen, Inc. and the final form of the Judgment which the Clerk can incorporate into the Judgment entry.

Signed this 16 day of January, 1986.

/s/ W. C. Stuart, Judge
Southern District of Iowa

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

Case Number: 82-383-A

The Conrad Industries Corp.; Van Buren County Alcohol, Inc.; Leonard F. Conrad; Mariett A. Conrad, Phenix Federal Savings & Loan Assoc.; Hansen-Friedrichsen, Inc.; and Conrad Farms, Inc.

v.

Shearson Loeb Rhoades, Inc. k/n/a Shearson/ American Express.

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered against the defendant, Shearson Loeb Rhoades, Inc. k/n/a Shearson/American Express, and in favor of the particular plaintiff named as follows:

CONRAD INDUSTRIES:
Five Hundred Eighty-seven Thousand, Seven Hundred Four Dollars and Ninety-three Cents ($587,704.93) with interest at the rate of 7.91% per annum from date of judgment until paid.

VAN BUREN COUNTY ALCOHOL:
Five Million, Nine Hundred Eighty-five Thousand, Seven

Hundred Eighty-nine Dollars and Sixty-seven Cents ($5,985,789.67) with interest at the rate of 7.91% per annum from date of judgment until paid.

LEONARD CONRAD:
Four Million, Nine Thousand, Four Hundred Seventeen Dollars and Twenty-six Cents ($4,009,417.26) with interest at the rate of 7.91% per annum from date of judgment until paid.

CONRAD FARMS, INC.:
One Million, Three Hundred Sixty-three Thousand, Thirty-seven Dollars and Thirty Cents ($1,363,037.30) with interest at the rate of 7.91% per annum from date of judgment until paid.

_____ _____

Date Clerk

_____

(By) Deputy Clerk

HANSEN-FRIEDRICHSEN, INC.:
Five Hundred Twenty-six Thousand, Eight Hundred Thirty-four Dollars and Thirty-three Cents ($526,834.33) with interest at the rate of 7.91% per annum from date of judgment until paid.

JERRY HANSEN and/or HANSEN-FRIEDRICHSEN, INC.:
Two Million, Four Hundred Twenty-six Thousand, Five Hundred Ninety-seven Dollars and Seventy-six Cents ($2,426,597.76) with interest at the rate of 7.91% per annum from the date of judgment until paid.

JERRY HANSEN:
One Million, Two Hundred Eighty-nine Thousand, Three Hundred Ninety-five Dollars and Seven Cents

($1,289,395.07) with interest at the rate of 7.91% per annum from date of judgment until paid.

DONALD E. HAUPERT and/or HAUPERT LIVESTOCK, INC.:
Five Hundred Thirty-six Thousand, One Hundred Ninety-eight Dollars and Twenty-three Cents ($536,198.23) with interest at the rate of 7.91% per annum from the date of judgment until paid.

PHENIX FEDERAL SAVINGS AND LOAN:
Judgment in favor of Phenix Federal and against Shearson for zero dollars.

Costs of this action are awarded to all plaintiffs.

September 13, 1985
Date

/s/ James R. Rosenbaum
Clerk

By: Shirley Dooley
Deputy Clerk

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

CIVIL NO. 82-383-A

The Conrad Industries Corp., et al.,
Plaintiffs,

vs.

Shearson Loeb Rhoades, Inc.,
k/n/a Shearson/American Express, Inc.,
Defendant.

ORDER FOR JUDGMENT

After a lengthy trial, the jury returned special interrogatories that favored the plaintiffs. In view of the complex issues in this case, the Court gave the parties time to file suggestions as to the form of judgment. All briefing has been completed. After hearing on September 9, 1985, the Court enters the following Order for Judgment upon the jury's answers to the special interrogatories.

CONRAD INDUSTRIES

The jury awarded Conrad Industries $419,000 as general damages on the difference in interest between the interest rate that would have been paid had 4.2 million dollars in industrial bonds been issued and the interest it has paid or presently owes to its suppliers. The jury also awarded Conrad Industries $156,000 interest differential as consequential damages incurred by Conrad Industries on amounts in excess of 4.2 million dollars. $100 were allowed as expenses. These amounts were awarded on both breach of contract and negligent misrepresentation theories. They are not cumulative. The jury found Conrad Industries 35% comparatively negligent. Therefore the

awards on negligent misrepresentation theory cannot exceed $272,350 and $101,400 and $65 respectively. Judgment should be entered for the greater amount or $575,100. As this is an award of interest, Conrad Industries is made whole without prejudgment interest prior to the jury verdict on June 25, 1985. Prejudgment interest will be allowed to date of judgment.

VAN BUREN COUNTY ALCOHOL (VBCA)

On the contract theory, the jury awarded this plaintiff $200 in interest rate differential; $715,221 operating loss for 1982; $1,402,386 operating loss for 1983; $564,700 lost profits for 1982; $647,300 lost profits for 1983; $149,525 costs and expenses and $1,200,000 for loss of credit reputation. The award totalled $4,679,332 on the Contract theory. Except for lost profits which was not submitted as an element of damages, the same awards were made on the theory of negligent misrepresentation. This amount, $3,467,332, must be reduced by 39% comparative negligence to $2,115,072.60. Judgment should be entered in the greater amount or $4,679,332 in favor of Van Buren County Alcohol.

Prejudgment interest is awarded at 10% from the date set forth to date of judgment.

Loss of credit reputation

on $1,200,000 from May 4, 1982.

Operating loss

on $715,221 from January 1, 1983

on $1,402,386 from January 1, 1984.

Lost profits

on $564,700 from January 1, 1983

on $647,300 from January 1, 1984.

Costs and expenses

on $149,525 from June 25, 1985.

Interest rate differental

on $200 from June 25, 1985.

LEONARD CONRAD

The jury awarded Leonard Conrad $3,000,000 for loss of credit reputation and $100 for costs and expenses growing out of defendants breach of contract. The same amount was awarded on the theory of negligent misrepresentation. Mr. Conrad was found to have been 42% comparatively negligent, reducing his award on that theory to $1,740,058. Judgment should be entered in his favor for $3,000,100. Prejudgment interest is allowed from May 4, 1982 to judgment.

CONRAD FARMS, INC.

On the contract theory, the jury awarded Conrad Farms, Inc. $500,000 for loss of credit reputation and $100 costs and expenses. The jury also awarded as loss in the value of equity in the farm land a total of $520,695. The award totalled $1,020,795. The same amount was awarded on the theory of negligent misrepresentation which must be reduced by 40% comparative negligence to $612,477. Judgment should be entered in favor of Conrad Farms, Inc. in the larger amount $1,020,795.

In addition prejudgment interest at 10% should be allowed from the date set forth to judgment.

$100 expenses from June 25, 1985.

$500,000 loss of reputation from May 4, 1982.

$384,016 loss of equity from May 4, 1982.

$136,679 loss of equity from June 4, 1982.

JERRY HANSEN AND/OR
HANSEN-FRIEDRICHSEN, INC.

The jury awarded these plaintiffs $1,731,433.77 on a judgment of the Citizens State Bank against them as a result of Shearson's breach of contract. For the same reason it awarded these plaintiffs $515,244 on a debt owed the Citizens State Bank. These same awards were made on the theory of negligent misrepresentation. The jury found Jerry Hansen 44% comparatively negligent and Hansen-Friedrichsen 37%. As Jerry Hansen acted for Hansen-Friedrichsen, the Court believes the corporation is bound by Mr. Hansen's conduct and the negligent misrepresentation award must be reduced by 44% on the judgment to $969,602.91 and on the debt to $288,536.64. Costs and expenses incurred as a result of Shearon's conduct were allowed these plaintiffs on contract theory in the amount of $27,875. This award must be reduced by 44% on negligent misrepresentation to $15,610.

Judgment should be entered in favor of Jerry Hansen and/or Hansen-Friedrichsen, Inc. in the amount of $2,374,552.77. Prejudgment interest is not allowed on the judgment or debt prior to the jury verdict as interest is included in the award. It is not allowed on $27,875 because the date of loss was not established. Prejudgment interest is awarded from June 25, 1985 to judgment.

HANSEN-FRIEDRICHSEN, INC.

The jury awarded Hansen-Friedrichsen for loss of equity in farmland as of December 1, 1984, $488,553.18 on the contract theory. For the negligent misrepresentation theory, it must be reduced to $273,589.78. Judgment should be entered in favor of Hansen-Friedrichsen, Inc. for $488,553.18. Prejudgment interest is awarded from December 1, 1984 to judgment.

JERRY HANSEN

The jury awarded Jerry Hansen $1,000,000 for loss of credit reputation on the contract theory and $38,000 for advances

made for interim financing on both the contract and negligent misrepresentation theory. The negligent misrepresentation award is reduced by 44% comparative negligence to $21,280. Judgment should be entered in the larger amount, $1,038,000.

Prejudgment interest is awarded on $1,038,000 from April 13, 1983 to date of judgment.

DONALD E. HAUPERT AND HAUPERT LIVESTOCK

The jury awarded these plaintiffs $524,698 as the amount due including interest on a note for $200,000 held by the Federal Deposit Insurance Corporation on both contract and negligent misrepresentation theories. Haupert's comparative negligence was fixed at 37% reducing that award to $330,559.74. Judgment should be entered for $524,698. As that award includes interest, prejudgment interest shall be allowed on $524,698 from June 25, 1985, the date of the jury verdict to date of judgment.

PHENIX FEDERAL

The jury found in favor of Phenix Federal on both the theories of negligent misrepresentation and promissory estoppel. The jury found no negligence of the part of Phenix Federal. Damages were awarded as follows:

Loan	$1,600,000
Interest on Loan	761,721
Advancements	1,629,890
Interest on advancements	1,131,843
Overseeing plant	25,000
	$5,148,454

Phenix Federal has already received $6,500,000 from the proceeds of an industrial bond issue. The jury has determined that Phenix will not be required to pay any money on its contingent guarantee. In accordance with damage Instruction No. 41 Phenix Federal, while prevailing, is entitled to recover nothing from Shearson.

IT IS THEREFORE ORDERED that the Clerk of the Court is authorized and directed to enter judgment against the defendant and in favor of the particular plaintiff named as follows. Prejudgment interest shall run to the date of judgment. After prejudgment interest has been computed Judgment may be entered as one figure for each named plaintiff.

Conrad Industries:

$575,100 with prejudgment interest at 10% from June 25, 1985.

Van Buren County Alcohol:

$1,200,000 with prejudgment interest at 10% from May 4, 1982.

$1,279,921 with prejudgment interest at 10% from January 1, 1983.

$2,049,686 with prejudgment interest at 10% from January 1, 1983.

$149,725 with prejudgment interest at 10% from June 25, 1985.

Leonard Conrad:

$3,000,000 with prejudgment interest at 10% from May 4, 1982.

$100 with prejudgment interest at 10% from June 25, 1985.

Conrad Farms, Inc.:

$884,016 with prejudgment interest at 10% from May 4, 1982

$136,679 with prejudgment interest at 10% from June 4, 1982

$100 with prejudgment interest from June 25, 1985.

Hansen-Friedrichsen, Inc.:
$488,553.18 with prejudgment interest at 10% from December 1, 1984.

Jerry Hansen and/or Hansen-Friedrichsen, Inc.
$2,374,552.77 with prejudgment interest at 10% from June 25, 1985.

Jerry Hansen:
$1,038,000 with prejudgment interest at 10% from April 13, 1983.

Donald E. Haupert and/or Haupert Livestock, Inc.:
$524,698 with prejudgment interest at 10% from June 25, 1985.

Phenix Federal Savings and Loan:
Judgment in favor of Phenix Federal and against Shearson for zero dollars.

Costs shall be awarded to all plaintiffs.

Signed this 13 day of September, 1985.

/s/ W.C. STUART, JUDGE
SOUTHERN DISTRICT OF
IOWA

Supreme Court, U.S.
FILED
FEB 10 1989
CLERK

(2)

No. 88-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHENIX FEDERAL SAVINGS & LOAN ASSOCIATION, F.A.
Petitioner,

—v.—

SHEARSON LEHMAN HUTTON INC.
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Should this Court review the Eighth Circuit's affirmance of the District Court's denial of a Rule 59 motion to amend the judgment or, in the alternative, for a new trial, when (i) the Court of Appeals considered the merits independently of the jury instructions and ruled on the basis of the applicable state law; (ii) in any event, Phenix failed to preserve its legal issues for review and invited the purported error about which it complains; and (iii) there is no conflict among the circuits with respect to the circumstances under which a party may raise an issue by post-trial motion following its failure to object to jury instructions?

(2) Should this Court review a decision of the Eighth Circuit that the plain error exception to Federal Rule of Civil Procedure 51 did not require reversal of the judgment when the Eighth Circuit applied the exception properly and in the same manner as all the circuit courts that recognize the exception?

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PHENIX FEDERAL SAVINGS & LOAN ASSOCIATION, F.A.,
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SHEARSON LEHMAN HUTTON INC.
Respondent.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent Shearson Lehman Hutton Inc. ("Shearson")[1] respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in this case. As Shearson will demonstrate, there is no good reason to grant the writ in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 856 F.2d 1125 (1988) and has been reprinted in the appendix to the petition. P.A. 1.[2]

[1] Pursuant to this Court's Rule 28.1, Shearson's corporate parents, affiliates, and non-wholly owned subsidiaries were listed in Louis A. Craco's letter to the Court dated December 30, 1988.

[2] The following abbreviations are used in this brief: P.A. for Petitioner's Appendix, Cert. Pet. for Petition for Certiorari, and R.A. for Respondent's Appendix.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

At issue on this petition for a writ of certiorari are the Seventh Amendment to the United States Constitution, U.S. Const. amend. VII, and Rules 51 and 59 of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 51 & 59.

STATEMENT OF THE CASE

A. The Original Loan and Subsequent Advances

In March 1981, Phenix Federal Savings & Loan Association, the predecessor-in-interest of petitioner Phenix Federal Savings & Loan Association, F.A. (collectively "Phenix"), lent $1.6 million to Van Buren County Alcohol, Inc. ("VBCA") as interim construction financing for an ethanol plant in Iowa. VBCA executed a demand promissory note and a mortgage on the plant in favor of Phenix. By late 1981, Phenix learned that Shearson Loeb Rhoades, Inc., the predecessor-in-interest of respondent Shearson, had refused to provide permanent financing to VBCA. In May 1982, Phenix commenced an action against Shearson in the United States District Court for the Southern District of Iowa, initially claiming $1.6 million in compensatory damages.

After learning that Shearson would not provide permanent financing, Phenix continued to fund the plant's operations rather than foreclosing on its first mortgage, notwithstanding that the plant had a market value at the time of $6.5 million, substantially more than the indebtedness of $1.6 million. From early 1982 through late 1984, Phenix provided VBCA with additional loans of more than $3.7 million.

B. The MTJ Bond Transaction

By late 1984, the principal amount of VBCA's indebtedness to Phenix had risen to $5,347,496. With interest,

the total was $7,241,061. At that time, Phenix decided to participate in a transaction whereby VBCA transferred ownership of the ethanol plant to MTJ, Inc. ("MTJ"), a newly created corporation, and the city of Bonaparte, Iowa sold $7.795 million in tax-exempt bonds for the purpose of financing the plant. Of the bond proceeds, $6.5 million was used to repay VBCA's indebtedness to Phenix, while the remainder was used to improve the plant and to cover the costs of financing. MTJ was primarily liable to repay the bond interest and indebtedness and Phenix guaranteed MTJ's repayment. The transaction (the "MTJ bond transaction") closed on December 27, 1984. Thus, when trial began in the District Court in January 1985, Phenix had been repaid the entire principal amount of its loans to VBCA, but faced contingent liability on its guarantee of the MTJ bond obligation.

C. The Trial

At trial, the damages sought by Phenix included not only $1.6 million for the initial loan and more than $5 million for subsequent loans and interest, but also $7,945,263, representing the full amount of its guarantee in the MTJ bond transaction, and a variety of other damages. As the Court of Appeals noted: "Phenix claimed the risk it faced in this deal as an element of consequential damages for which Shearson was responsible, and it asked the jury to determine how much it would likely lose on the letter of credit and award it that sum. The [District] Court accepted this theory. . . ." P.A. at 8.

Thus, the MTJ bond transaction, and the extent of Phenix's contingent liability on its guarantee, were put at issue by Phenix in an effort to maximize its potential recovery. In implementing this trial strategy, Phenix was the first party to bring the MTJ bond transaction to the jury's attention, in counsel's opening statement, R.A. at 6, and later introduced evidence designed to show that the ethanol plant would not likely be profitable, *id.* at 19. For its part, Shearson introduced projections prepared by Phenix's own accountant that the plant would produce sufficient revenue to cover principal and interest payments on the MTJ bonds. *Id.* at 18.

With Phenix seeking to recover consequential damages as a result of its contingent liability on the MTJ bonds, the District Court assigned to Phenix the burden of proving its entitlement to recover such damages, just as it had assigned to Phenix the burden of proving its other damages. *See* R.A. at 24-25. In addition, the Court determined that because Phenix sought to recover damages stemming from this contingent liability, the $6.5 million realized by Phenix in the MTJ transaction must be subtracted from any damages it might be awarded in order to prevent duplicative recovery. This approach was embodied in Instruction No. 41 to the jury, the text of which appears in the Eighth Circuit's opinion in this case. P.A. at 8-9.[3]

Having invited this approach by the way in which it framed its damage claims, Phenix naturally failed to interpose any objection to Instruction No. 41. Instead, Phenix repeatedly expressed its full agreement with the $6.5 million set-off. Responding to Shearson's motion for a directed verdict, counsel for Phenix told the District Court: "[Y]ou've already subtracted, *which we fully agree with,* the six and a half million." R.A. at 6 (emphasis added). Counsel for Phenix reiterated this point three times during summation. First, he told the jury that "the damages which we are claiming, totals $20,600,324.57, and from that figure the Court will instruct you that you're not

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[3] In substance, the District Court informed the jury that a damages award could include any payment Phenix established it would be required to make over the life of the bonds for which it would not be reimbursed, but that the Court would reduce any award by the $6.5 million that Phenix had admittedly received in the transaction. The Court specifically advised the jury that Phenix would recover nothing if its total damages prior to the offset were less than $6.5 million.

The Court also submitted to the jury, without objection by Phenix, Special Interrogatory No. 6, which asked:

> Has Phenix Federal established by a preponderance of the evidence it [sic] claim for CONTINGENT LOSS CONSISTING OF THE AMOUNT OF PRINCIPAL AND INTEREST ON THE MTJ BONDS THAT PHENIX FEDERAL WILL PAY FOR WHICH IT WILL NOT BE REIMBURSED UNDER THE GUARANTEES OR THE PLANT MORTGAGES, REDUCED TO PRESENT VALUE[?]

to consider the fact that he will subtract from this figure, *and we fully agree with this calculation.*" *Id.* (emphasis added). Second, he said that "the Court will instruct — *which we agree with this instruction,* will subtract $6.5 million from that which represents the money that we have received in the bond transaction." *Id.* (emphasis added). Finally, in his rebuttal summation, counsel for Phenix stated: "When you look on the board, those are the figures which reflect our damages as they are today when you must consider them, and they total the 19 million, as I have stated; *and when the Judge subtracts, as he will instruct you he will do, the 6.5, you will have the figure that we say we're damaged today.*" *Id.* (emphasis added).

The jury awarded Phenix $5,148,554 on theories of negligent misrepresentation and promissory estoppel. The jury also determined, by answering Special Interrogatory No. 6, *see supra* note 3, in the negative, that Phenix had not met its burden of proving it would be required to expend any funds on its contingent guarantee in the MTJ bond transaction for which it would not be reimbursed. The District Court then subtracted the $6.5 million Phenix received in the MTJ bond transaction, as Phenix had previously agreed was appropriate.

D. Post-Trial Motions

Once the jury returned a verdict that did not meet Phenix's expectations, however, Phenix did an about-face. In its motion to amend the judgment or for a new trial, pursuant to Federal Rule of Civil Procedure 59, Phenix argued to the District Court, *inter alia,* that the $6.5 million offset was improper. Shearson responded, among other things, that there had been no error in the assessment of damages. *See* R.A. at 26-31. The District Court denied Phenix's motion. P.A. at 47.

E. The Appeal to the Eighth Circuit

On appeal to the Eighth Circuit, Phenix argued that the District Court had erred, under the Iowa law of damages, in admitting evidence of proceeds from the MTJ bond transaction[4] and in offsetting those proceeds against the jury's damage

[4] The petition for certiorari does not challenge the District Court's evidentiary ruling.

award. *See* R.A. at 1. Phenix made a number of arguments on appeal that it had not made in its Rule 59 motion as to why it claimed the offset was improper under state law.[5]

In addition, Phenix introduced an alternative argument it had not made in its post-trial motion: even if the MTJ bond transaction was relevant, the District Court had misallocated the burden of proof under Iowa law when it required Phenix to prove how much it could be expected to lose on the transaction. *Id.* at 2. Phenix conceded that the purported misallocation of the burden of proof could not be reversed on appeal unless there had been plain error, since there had been no objection to the allocation at trial. *Id.*

Shearson argued to the Eighth Circuit, among other things, that the District Court had correctly applied the law of Iowa in applying the $6.5 million offset and allocating the burden of proof. *Id.* at 10-22. Shearson also argued that Phenix was precluded from challenging the judgment on the alternative grounds that the jury instructions including the offset and the allocation of the burden of proof had been invited by Phenix as a result of tactical positions it took at trial, its express encouragement of and agreement with the instructions, and its failure to object to the instructions. *Id.* at 3-10.

On March 10, 1988, the Eighth Circuit filed an opinion affirming the judgment of the District Court. *Phenix Federal Savings & Loan Ass'n, F.A. v. Shearson Loeb Rhoades, Inc.*, No. 86-1407 (8th Cir. Mar. 10, 1988). Phenix thereafter filed a petition for rehearing and suggestion for rehearing en banc. On May 3, 1988, the Eighth Circuit denied Phenix's petition for rehearing en banc. In an order dated September 9, 1988, the Eighth Circuit also denied Phenix's petition for rehearing by the panel but simultaneously issued a slightly revised opinion.

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[5] For example, in its petition Phenix refers to its argument that the $6.5 million offset was improper because it "was not reasonably certain." Cert. Pet. at 9. This argument was not made in Phenix's Rule 59 motion.

The September 9 opinion rejected Phenix's arguments, stating in part:

> [U]nder the applicable law Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million. The jury found that Phenix had lost over $5 million on the loan to Van Buren County Alcohol, but had not proved that it would lose anything on the letter of credit. Therefore Phenix got exactly what it was entitled to.
>
> Only if the statement of the applicable law contained in the jury instruction Phenix now complains of were egregiously wrong, and that statement produced a result substantially different from what would have resulted from a correct instruction, would we find plain error in this civil case. This did not happen here. The instruction at issue was, at worst, arguable, and it resulted at least in part from Phenix's own tactical position at trial.

P.A. at 11.

REASONS FOR DENYING THE WRIT

Phenix's petition makes two arguments: first, the Court of Appeals erred in permitting Instruction No. 41 to bar post-trial review of the $6.5 million offset; and, second, assigning to Phenix the burden of proving damages stemming from the MTJ bond transaction was plain error. As to both issues, Phenix maintains that there is a split among the circuits requiring resolution by this Court.

Phenix's first point rests on the erroneous premise that the Eighth Circuit treated Instruction No. 41 as the law of the case for purposes of post-trial motions. In fact, the Court of Appeals considered and rejected Phenix's argument that the offset was improper. Moreover, contrary to Phenix's suggestion, there is no confusion or lack of uniformity among the federal courts as to how the failure to object to jury instructions should affect post-trial motions. In cases in which a trial court erred in denying a motion for a directed verdict, failure to object to a jury charge will not bar post-verdict review. Although the

Court of Appeals did not treat Instruction No. 41 as the law of the case, neither its prior precedents nor the decisions from other courts of appeals entitled Phenix to the broad review on the merits that it received. Unlike cases in which a party moved for a directed verdict, but failed to object to jury instructions, Phenix did not preserve an objection to the offset ruling in any manner. To the contrary, Phenix invited that ruling and then expressly approved it. Finally, if the Eighth Circuit did depart from its precedents on the review of post-verdict motions, the mere intra-circuit conflict does not merit review by this Court.

As to Phenix's second point, there is similarly no need for intervention by this Court. First, there is no significant split among the circuits on this issue. The Eighth Circuit, in this case and others, is in the mainstream of plain error jurisprudence. Any disagreement among the circuits is irrelevant to the result below and insufficiently serious to warrant review by this Court. Second, contrary to Phenix's suggestion, the Eighth Circuit did not abrogate the plain error exception in this case. Instead, it applied the exception properly under the facts presented here. Finally, even if the Eighth Circuit erred in its application of the plain error doctrine, there is no reason to grant the writ, since this Court is not primarily concerned with the correction of error.

I.

THIS CASE DOES NOT REFLECT A NEED FOR GUIDANCE FROM THIS COURT ON THE RELATIONSHIP BETWEEN JURY INSTRUCTIONS AND POST-TRIAL MOTIONS.

Phenix contends that "both the district court and the court of appeals held that by failing to object to [Instruction No. 41], Fed.R.Civ.P. 51 precluded consideration of the propriety of the $6.5 million offset — at the appellate level and at the trial level under Fed.R.Civ.P. 59." Cert. Pet. at 13. More generally, Phenix argues that "[t]his case dramatizes a general confusion in the lower courts on the relationship between jury instructions and post-verdict motions." *Id.* Phenix is incorrect on both counts.

In the first place, contrary to the essential premise of Phenix's petition, the Eighth Circuit never determined that Instruction No. 41 was the law of the case. Instead, the Court of Appeals considered and rejected the merits of Phenix's argument and in so doing went well beyond what it was required to do under the circumstances of this case.

Specifically, the Court of Appeals stated: "[*U*]*nder the applicable law* Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million." P.A. at 11 (emphasis added).[6] The Court of Appeals thus decided, as Shearson argued, that the offset was proper under Iowa law and did not confine itself to Phenix's failure to object.

Furthermore, contrary to the other basic premise of the first point of Phenix's petition, there is no lack of consensus among the federal courts of appeals "as to what role the failure to object to jury instructions should play in post-verdict motions," Cert. Pet. at 16. As the cases cited by Phenix demonstrate, this issue has most often arisen when a party who has moved for a directed verdict that has been denied subsequently fails to object to jury instructions. While Phenix suggests that the federal courts of appeals have taken three different approaches on the issue, the cases cited in Phenix's petition and many others demonstrate remarkable uniformity among the circuits. They hold that when determining whether a trial court erred in denying a motion for a directed verdict, it is the applicable law — and not what the trial court announces in its instructions to be the law — that controls.

The Eighth Circuit has been in the vanguard, and remains in the mainstream, on this issue, going back to *Coca Cola Bottling Co. of Black Hills v. Hubbard*, 203 F.2d 859 (8th Cir. 1953). In *Coca Cola*, the defendant contended that the trial court erred in denying a motion for directed verdict and permitting the case to go to the jury. The plaintiff responded

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[6] Although the Court of Appeals stated that it did "not need to reach" Phenix's legal arguments, P.A. at 10, it is clear that the Court did not rest its decision on the procedural default and in fact did reach the merits.

that the jury instructions, to which there had been no objection, became the law of the case and foreclosed review of the sufficiency of the evidence. The court disagreed:

> [I]n determining whether a trial court has erred in denying a motion for a directed verdict made at the close of the evidence, it is the applicable law which is controlling, and not what the trial court announces the law to be in his instructions. This Court must ascertain for itself what the applicable law is, whether the instructions were excepted to or not. A proper motion for a directed verdict and its denial will always *preserve for review* the question whether under the law truly applicable to the case there was an adequate evidentiary basis for the submission of the case to the jury.

Id. at 862 (emphasis added); *accord Wilson v. Sears, Roebuck & Co.*, 757 F.2d 948, 953 (8th Cir. 1985) (district court appropriately granted defendant's motion for judgment n.o.v., notwithstanding prior inconsistent jury charge), *cert. denied*, 474 U.S. 1059 (1986); *Johnson v. United States*, 434 F.2d 340, 342-43 (8th Cir. 1970) (motions for directed verdict and judgment n.o.v. should have been granted, notwithstanding government's failure to object to jury charge).

The Eighth Circuit's rule in *Coca Cola* has been quoted and followed by other circuits to consider the issue. *See, e.g.*, *Rakovich v. Wade*, 850 F.2d 1180, 1203 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 497 (1988); *Ebker v. Tan Jay International, Ltd.*, 739 F.2d 812, 825-26 n.17 (2d Cir. 1984); *Aspen Highland Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1517-18 (10th Cir. 1984) (defendant's motions for directed verdict preserved opportunity to challenge sufficiency of evidence under truly controlling law, notwithstanding failure to object to jury charge), *aff'd*, 472 U.S. 585 (1985);[7] *Dual*

[7] *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471 (10th Cir. 1985), cited by Phenix, Cert. Brief at 16, is not contrary to the *Coca Cola* principle, or to the Tenth Circuit decision in *Aspen Highland*. In that case, Firestone moved for a directed verdict, claiming that warehouse agreements containing an integration clause superseded certain letters on which the counterclaimants relied. The Court of Appeals determined that the motion for a directed verdict was properly denied because the issue of whether the letters formed

Manufacturing & Engineering, Inc. v. Burris Industries, Inc., 619 F.2d 660, 661-63 (7th Cir.) (en banc) (issue of obviousness preserved for appellate review, despite failure to object to jury charge, because of motion for judgment n.o.v.), *cert. denied*, 449 U.S. 870 (1980); *House of Koscot Development Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 65-66 (5th Cir. 1972) (failure to object to jury charge does not become law of case for purposes of review of denial of motion for directed verdict).[8] There is simply no conflict among the circuits. The circuits that have addressed the issue have held that failure to object to a jury charge does not preclude a grant of a motion for judgment n.o.v.[9]

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an agreement separate from the warehouse agreements raised a question of fact for the jury. Notwithstanding the factual question whether the warehouse agreements precluded reliance on the earlier letter agreements, Firestone submitted no instructions on the issue. Instead, Firestone, without objection, permitted the jury to be instructed that the existence of the letter agreements was admitted. Firestone therefore could derive no benefit from the *Coca Cola* line of cases, because its motion for a directed verdict was properly denied and did not preserve the issue it sought to raise on appeal.

[8] This Court, too, has endorsed this rule. *See City of St. Louis v. Praprotnik*, 108 S. Ct. 915, 922 (1988) (plurality opinion) (failure to object to jury instruction does not render instruction "law of the case" for purposes of appellate review of denial of directed verdict or judgment n.o.v.).

[9] Phenix also relies upon two cases that are very fact-specific and presented important substantive questions of federal law. These cases clearly do not support the granting of relief in this case. In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court held that municipalities were immune from punitive damages in actions brought under 42 U.S.C. § 1983. The Court noted that while Newport had failed to object to the punitive damages instruction at trial, the district court had gone beyond the procedural default to consider the merits when it denied Newport's motion for a new trial. 453 U.S. at 253-55; see *Elwood v. Pina*, 815 F.2d 173, 176 (1st Cir. 1987). In light of the district court's treatment of the merits, this Court likewise reached the merits of the important federal issue presented. *See* 453 U.S. at 256; *accord Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 108 (2d Cir. 1988) (reaching merits of whether punitive damages were available under Lanham Act because, among other things, district court had reached this important and novel legal issue).

Although the Court of Appeals reviewed Phenix's challenge to the offset, it was not required to do so under its prior precedents or the law of any circuit. Phenix failed to show any plausible entitlement to post-trial relief under the circumstances here, which are fundamentally different from those present in the *Coca Cola* line of cases upon which Phenix principally relies. In those cases, the party who had failed to object to the instructions had informed the district court of and had preserved its position by moving for a directed verdict in the manner contemplated by the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 50(b). In the absence of a motion for a directed verdict, denial of any post-trial relief from the erroneous jury instructions would have been mandated.

Under the *Coca Cola* line of cases, Phenix's failure to preserve its legal position in any manner was itself a sufficient ground for denial of post-trial relief. Here, however, there was a further basis for denial of the Rule 59 motion, since Phenix affirmatively invited the purported error about which it now complains. As found by the Court of Appeals, the alleged error "resulted at least in part from Phenix's own tactical position at trial." P.A. at 11. In an effort to increase its potential recovery, Phenix made the tactical decision to claim "the risk it faced in this deal as an element of consequential damages for which Shearson was responsible, and it asked the jury to determine how much it would likely lose on the letter of credit and award it that sum." *Id.* at 8. Having taken this position, Phenix necessarily accepted the offset — a concept that it expressly approved on four occasions during the trial. Phenix has cited no authority that would support the granting of Rule 59 relief under these circumstances, much less conflicting authority among the circuits on the question.[10]

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[10] Phenix relies upon *Hutches v. Renfroe*, 200 F.2d 337 (5th Cir. 1952). Cert. Brief at 22. *Hutches*, however, does not implicate Rule 51 or the jury function in any way, since it was tried without a jury. 200 F.2d at 338.

Similarly, *Solomon v. United States*, 276 F.2d 669 (6th Cir.), *cert. denied*, 364 U.S. 890 (1960), cited by Phenix, Cert. Brief at 19-20, is distinguishable. Although the Sixth Circuit permitted the defendants to raise a legal issue on a motion for a new trial where an instruction based upon the wrong statute had been given inadvertently, it held that the district court had properly denied the motion. 276 F.2d at 674.

Where, as here, a party, through its tactical positions or other conduct, has invited or induced the purported error about which it complains, the courts of appeals have held that the error may not be raised on appeal. For example, in *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985), both parties requested a jury instruction that the plaintiff need prove its case by a preponderance of the evidence. On appeal, the defendant urged reversal on the ground that the correct burden of proof was "clear, unequivocal, and convincing evidence." He argued that his failure to object to the charge should be excused under the plain error exception. *Id.* at 727. The court rejected this contention:

> We are reluctant to review this issue even on plain error grounds. Hester not only failed to object to the court's burden of proof instruction, *see* Fed.R.Civ.P. 51, but submitted the preponderance of the evidence standard in three of his requested instructions. Thus, we need not search for plain error, for it is "fundamental that where the defendant 'opened the door' and 'invited error' there can be no reversible error."

Id. (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)); *accord, e.g., Rakovich v. Wade*, 850 F.2d 1180, 1203 (7th Cir.) (en banc) (where party proposes jury instruction, he cannot complain of error), *cert. denied*, 109 S. Ct. 497 (1988); *RCA/Ariola International, Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 778-79 (8th Cir. 1988) (plaintiff barred by invited error doctrine from challenging finding of joint and several liability since plaintiff contended that defendants jointly and severally infringed copyright); *Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295-96 (7th Cir. 1987) (failure to object to instruction as part of "trial strategy" not excused by plain error doctrine); *Gilchrist v. Jim Slemons Imports, Inc.*, 803 F.2d 1488, 1493 (9th Cir. 1986) (party who requests instruction invites any error contained therein and, absent objection before submission to jury, waives appellate review of its correctness); *Crockett v. Uniroyal, Inc.*, 772 F.2d 1524, 1530 n.4 (11th Cir. 1985) (cardinal rule of appellate review that party may not challenge ruling or other trial proceeding he invited); *All American Life & Casualty Co. v. Oceanic Trade Alliance*

Council International, Inc., 756 F.2d 474, 479-80 (6th Cir.) (where injection of evidence is attributable to action of party seeking to exclude evidence, invited error doctrine applies), *cert. denied*, 474 U.S. 819 (1985); *Weinar v. Rollform Inc.*, 744 F.2d 797, 805 (Fed. Cir. 1984) (invited error doctrine bars challenge to admissibility of testimony elicited by party's cross examination in absence of motion to strike), *cert. denied*, 470 U.S. 1084 (1985); *Computer Systems Engineering, Inc. v. Qantel Corp.*, 740 F.2d 59, 64 (lst Cir. 1984) (defendant could not invite error by requesting jury instructions based on statement of law it would later challenge on appeal); *Dubose v. Kansas City Southern Railway*, 729 F.2d 1026, 1033 & n.4 (5th Cir. 1984) *cert. denied*, 469 U.S. 854 (1984); *Gundy v. United States*, 728 F.2d 484, 488 (l0th Cir. 1984) (per curiam); *McDonald v. Federal Laboratories, Inc.*, 724 F.2d 243, 248 (lst Cir. 1984) ("the 'plain error' doctrine has no application where the party claiming error invited or elicited the alleged error"); *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691, 696 (8th Cir. 1978) (defendant invited error by telling trial court that jury could find punitive damages without awarding actual damages); *Herman v. Hess Oil Virgin Islands Corp.*, 524 F.2d 767, 772 (3d Cir. 1975) (counsel having proposed that evidence be developed in summation rather than in jury charge, invited error doctrine bars challenge to trial court's failure in jury instructions to relate relevant law to disputed facts); *James v. Beaufort County Board of Education*, 465 F.2d 477, 479 (4th Cir. 1972); *Director General of India Supply Mission v. Steamship Maru*, 459 F.2d 1370, 1377 (2d Cir. 1972), *cert. denied*, 409 U.S. 1115 (1973).

Finally, even if the decision of the Court of Appeals represents a departure from the rationale of *Coca Cola*, as Phenix argued to the Eighth Circuit in its petition for rehearing and suggestion for rehearing en banc, the decision below would represent no more than an intra-circuit conflict, which should be resolved by the Eighth Circuit rather than by this Court. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.6, at 204-05 (6th ed. 1986); *see generally Davis v. United States*, 417 U.S. 333, 340 (1974) (Solicitor General opposed certiorari petition on ground that intra-circuit conflict should be resolved by circuit; petition was denied).

II.

THE EIGHTH CIRCUIT APPLIED THE PLAIN ERROR EXCEPTION TO FEDERAL RULE OF CIVIL PROCEDURE 51 PROPERLY AND IN A MANNER CONSISTENT WITH THE OTHER CIRCUITS THAT RECOGNIZE THE EXCEPTION.

Taken literally, Rule 51 bars a party from assigning a jury instruction as error unless objection to that instruction was lodged before the jury retired to deliberate. Over the years, however, courts have recognized a "plain error" exception to that blanket rule in cases where literal application of Rule 51 would result in a miscarriage of justice. *See* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2558, at 672 (1971).

Phenix maintains that the Eighth Circuit has effectively "abrogat[ed]" the plain error exception, thereby aligning itself with the First, Seventh, and Ninth Circuits in opposition to the other circuits. Cert. Pet. at 24. This argument rests on a misunderstanding of the law and a misreading of what took place below.

Contrary to Phenix's suggestion, the Eighth Circuit is in the mainstream of Rule 51 jurisprudence. It follows the same approach as all other circuits that have considered adoption of the plain error exception, except for the Ninth Circuit, the only court of appeals to reject the exception.[11] In this case, the Eighth Circuit stated that the exception applies

> where the alleged error "is plain error in the sense that a miscarriage of justice would otherwise result." *Rowe International, Inc. v. J-B Enterprises, Inc.*, 647 F.2d 830,

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[11] *See, e.g., Brett v. Hotel, Motel, Restaurant, Construction Camp Employees & Bartenders Union*, 828 F.2d 1409, 1414 n.7 (9th Cir. 1987); *Moore v. Telfon Communications Corp.*, 589 F.2d 959, 966 (9th Cir. 1978). Even the Ninth Circuit has recognized an exception to Rule 51 when the district court is aware of a party's position and further objection would be futile. *See, e.g., Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *United States v. 57.09 Acres of Land, More or Less, Situate in Skamania County, State of Washington*, 757 F.2d 1025, 1027 (9th Cir. 1985); *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems*, 732 F.2d 1403, 1410 (9th Cir. 1984).

> 835 (8th Cir. 1981). But we emphasize the extremely narrow scope of this rule in civil cases; it lies "in only those exceptional cases where the error has 'seriously affected the fairness, integrity or public reputation of judicial proceedings.'" *Morris v. Getscher*, 708 F.2d 1306, 1309 (8th Cir. 1983), quoting *Rowe International, supra*, at 835.

P.A. at 11; *see also Elmore v. United States*, 843 F.2d 1128, 1132 (8th Cir. 1988); *Thomas v. Booker*, 784 F.2d 299, 307 (8th Cir.), *cert. denied*, 476 U.S. 1117 (1986); *Swift v. R.H. Macy's & Co.*, 780 F.2d 1358, 1360-61 (8th Cir. 1985); *Gander v. Mr. Steak of Sun Ray, Inc.*, 774 F.2d 920, 923 (8th Cir. 1985); *Smith v. Honeywell, Inc.*, 735 F.2d 1067, 1069 (8th Cir.), *cert. denied*, 469 U.S. 1077 (1984); *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199, 1209-10 (8th Cir. 1982).

Phenix is also incorrect in its assertion that the First and Seventh Circuits reject the plain error exception. The First Circuit accepts the doctrine in exceptional cases where necessary to prevent a clear miscarriage of justice. *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Board of Realtors*, 850 F.2d 803, 809 (lst Cir.), *cert. denied*, 109 S. Ct. 392 (1988); *Elwood v. Pina*, 815 F.2d 173, 175-76 (lst Cir. 1987); *Morris v. Travisono*, 528 F.2d 856, 859 (lst Cir. 1976); *Nimrod v. Sylvester*, 369 F.2d 870, 873 (lst Cir. 1966). The Seventh Circuit also recognizes an exception to the objection requirements of Rule 51 "in 'very rare circumstances where necessary to prevent a miscarriage of justice.'" *Rakovich v. Wade*, 850 F.2d 1180, 1203 (7th Cir.) (en banc) (quoting *Shearson Hayden Stone, Inc. v. Leach*, 583 F.2d 367, 370 (7th Cir. 1978)), *cert. denied*, 109 S. Ct. 497 (1988).[12]

Moreover, the approach taken in the First, Seventh, and Eighth Circuits does not differ in any significant way from that followed in the circuits that Phenix views as more lenient. *See,*

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[12] The Seventh Circuit has held, however, that the plain error doctrine will not protect parties from the consequences of their decisions where, as here, the failure to object may be part of their trial strategy. *See Williamson v. Handy Button Machine Co.*, 817 F.2d 1290, 1295-96 (7th Cir. 1987); *see also Rakovich, supra*, 850 F.2d at 1202-03 (refusing to apply plain error exception where party proposed jury instruction it cited on appeal as error).

e.g., *Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 107-08 (2d Cir. 1988) (plain error doctrine appropriate to correct "obvious instances of injustice or misapplied law") (quoting *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981)); *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1414 (11th Cir. 1986) (doctrine applies "only in exceptional cases where the error is "'so fundamental as to result in a miscarriage of justice'"") (quoting *Patton v. Archer*, 590 F.2d 1319, 1322 (5th Cir. 1979)), *cert. denied*, 479 U.S. 1090 (1987); *Kerr v. State Farm Fire & Casualty Co.*, 731 F.2d 227, 229 (4th Cir. 1984) (exception applies where error was fundamental and highly prejudicial) (citing *Ratay v. Lincoln National Life Insurance Co.*, 378 F.2d 209, 212 (3d Cir.), *cert. denied*, 389 U.S. 973 (1967)); *Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23, 27 (3d Cir. 1981) (exception applies when error is fundamental and highly prejudicial or when instructions leave jury without adequate guidance and failure to consider error would result in miscarriage of justice); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369, 1371 (5th Cir. 1969) (exception applies when "error has been committed which results in a miscarriage of justice"); *O'Brien v. Willys Motors, Inc.*, 385 F.2d 163, 166 (6th Cir. 1967) (exception applies where error is obvious and prejudicial).

In short, the Eighth Circuit applied in this case essentially the same standard that prevails in all circuits but the Ninth. A deviation from the prevailing rule by a single circuit does not create a sufficiently serious conflict to justify certiorari, particularly in a case where the petitioner received the benefit of the standard favorable to its position and still lost. *See generally* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.4, at 201-02 (6th ed. 1986) (certiorari may be denied where resolution of conflict is irrelevant to ultimate outcome of case).[13]

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[13] Even if there were a serious conflict among the courts concerning the proper interpretation of Rule 51, such a disagreement would not provide a strong basis for a grant of certiorari. Importantly, conflicting interpretations of Rule 51 will not lead to forum-shopping, since no one will choose where to sue based on the likelihood that an appeals court will reconsider a jury charge to which no objection has been stated. Nor will a conflict on this issue pose difficulties for individuals or corporations who conduct their activities

There is also no substance to Phenix's suggestion that the Eighth Circuit, while paying lip service to the plain error exception, effectively ignored it in this case. Cert. Pet. at 24. The Court of Appeals correctly found that the instruction of which Phenix complains did not fall within the plain error exception because it was "at worst, arguable" and "resulted at least in part from Phenix's own tactical position at trial." P.A. at 11. As Shearson argued to the Eighth Circuit, the burden of proof was properly assigned to Phenix because it affirmatively sought more than $7.9 million in damages on the basis of its guarantees in the MTJ bond transaction. Having made that affirmative claim, Phenix assumed the burden of proving its damages, i.e., that it would suffer a loss as a result of its guarantee.

Finally, even assuming that the Eighth Circuit erred in its application of the plain error doctrine, this would not be an appropriate case for a grant of certiorari. "It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* § 4.17, at 221 (6th ed. 1986); *see Boag v. McDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting) (quoting Address of Chief Justice Vinson before the American Bar Association (Sept. 7, 1949)); *Watt v. Alaska*, 451 U.S. 259, 275-76 & n.5 (1981) (Stevens, J., concurring). If this Court were to review application by the courts of appeals of the plain error doctrine to the facts of particular cases as Phenix requests here, it would deviate from its appropriate role.

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in several states, because Rule 51 does not state a substantive obligation with which they must comply. *See generally* Estreicher & Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 725 (1984).

Indeed, there is some benefit to be derived from circuit-by-circuit experimentation in procedural rules. *See* Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 Am. U.L. Rev. 881, 898-99 & n.61 (1975).

CONCLUSION

For the reasons set forth above, respondent Shearson Lehman Hutton Inc. respectfully requests that this Court deny the instant petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

Dated: February 10, 1989
New York, New York

Respectfully submitted,

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RESPONDENT'S APPENDIX 1

EXCERPTS FROM PHENIX FEDERAL'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Filed August 29, 1986

[Caption and Material Omitted]
[p. 25]

ARGUMENT

I. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF PROCEEDS FROM THE MTJ BOND TRANSACTION AND OFFSETTING THOSE PROCEEDS AGAINST THE JURY'S DAMAGE AWARD.

[Material Omitted]
[p. 33]

Analysis of cases applying these principles in Iowa and elsewhere demonstrate three distinct, yet interrelated reasons the MTJ bond transaction was irrelevant in this case, each legally sufficient in and of itself to bar admission: (1) the bond transaction did not confer a "benefit" on Phenix Federal; (2) the prospects of the bond issue were at best too speculative to submit to the jury — a conclusion actually reached by the District Court on a related issue — and (3) any benefit that might have accrued to Phenix Federal had the plant been successful over the next twenty years would clearly have derived from a collateral source — an independent contract entered into by Phenix Federal for substantial consideration and at substantial risk.

[Material Omitted]
[p.43]

Finally, the $6.5 million would not have been a proper offset even if the prospects of the plant had been amenable to proof, the burden on that issue properly allocated (*see* Part II *infra*), and sufficient evidence presented to prove the plant would be successful.

[Material Omitted]
[p. 46]

II. ASSUMING *ARGUENDO* THE MTJ BOND PROCEEDS WERE ADMISSIBLE, THE TRIAL COURT IMPROPERLY PLACED ON PHENIX FEDERAL THE BURDEN OF PROVING HOW MUCH IT WOULD LOSE ON THE LETTER OF CREDIT

Even if the $6.5 million in proceeds and the prospects of the ethanol plant through 2004 had been admissible as both relevant and amenable to proof to a reasonable certainty, how much Phenix Federal was likely to retain would necessarily be a matter of mitigation, with the burden of proof on defendant Shearson. Instead, the burden was placed on Phenix Federal in the form of special interrogatory No. 6.

[Material Omitted]
[p. 55]

If this court concludes the MTJ proceeds were admissible as an offset, analysis must then focus on allocation of the burden of proof on the prospects of the bond issue. On that issue there was admittedly no trial objection. It is therefore not reviewable here unless misallocation of that burden constitutes "plain error."

[Material Omitted]

RESPONDENT'S APPENDIX 2

EXCERPTS FROM SHEARSON'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Filed April 15, 1987

[Caption and Material Omitted]

[pp. 7-11]

ARGUMENT

POINT I

PHENIX'S APPEAL MUST BE DENIED

A. Phenix Waived Its Right To Appeal The Offset, The Introduction Of Evidence And The Allocation Of The Burden Of Proof Relating To The MTJ Transaction, And Thus Its Damage Judgment Is Not Reviewable By This Court.

Phenix failed to preserve as issues for appeal any objections to the offset, burden of proof and evidentiary rulings which it now claims constitute reversible error. As shown below, Phenix's waiver with respect to these issues could not be more compelling.

1. Phenix's failure to object at trial bars its present appeal.

A party's failure to object or otherwise inform the court of its disagreement with the court's action waives the objection and precludes later appeal. *See, e.g., Dehues v. Western Electric Co.*, 710 F.2d 1344 (8th Cir. 1983); *United States ex rel. Planet Corp. v. McDonald Construction Co.*, 417 F.2d 687 (8th Cir. 1969). This waiver applies to all court actions, whether rulings on questions of law, jury instructions or admission of evidence. *See* Fed. R. Civ. P. 51 (party must object to

jury instruction before jury is charged in order to preserve appeal); Fed. R. Civ. P. 46 (failure to make known to court objection to ruling or grounds therefor or to inform court of desired contrary ruling waives later appeal); Fed. R. Evid. 103(a)(1) (appeal on basis of erroneous decision concerning admission or exclusion of evidence is barred by failure to object at time of ruling).

To preserve an issue for appeal, a party must raise the issue in the trial court before or at the time of the court's decision. *Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713 (8th Cir. 1976). Issues which were "not raised in the trial court cannot be considered by [an appellate court] as a basis for reversal." *Edwards v. Hurtel*, 724 F.2d 689, 690 (8th Cir. 1984); *Kelley v. Crunk*, 713 F.2d 426, 427 (8th Cir. 1983); *Rowe International, Inc. v. J-B Enterprises, Inc.*, 647 F.2d 830, 835 (8th Cir. 1981). *See also Shepard v. General Motors Corp.*, 423 F.2d 406 (1st Cir. 1970) (appellants cannot appeal from trial court's ruling that damages would be offset where they did not contest or object to the ruling during trial).

The reasons for requiring a party to object to, or make known its disagreement with, a court's action at the time of that action are twofold. First, it enables the court to "reconsider the ruling and make desired changes". *Edwards v. Hurtel*, 724 F.2d 689, 690 (8th Cir. 1984); *Morrow v. Greyhound Lines, Inc.*, 541 F.2d 713, 724 (8th Cir. 1976). Second, it prevents a losing party from unfairly obtaining a new trial or other relief by relying on a possible error at trial which it should have sought to correct. *Johnson v. Houser*, 704 F.2d 1049 (8th Cir. 1983); *Lange v. Schultz*, 627 F.2d 122 (8th Cir. 1980). Otherwise a party could secure a second opportunity to try its case if it decided that it were dissatisfied with the first result.

Phenix offers no excuse for its failure to object below. Phenix was given ample notice by Shearson of its position and

by the District Court of its rulings and instructions. Shearson made known its position concerning the effect of the MTJ bond proceeds throughout the trial proceedings.[3] Similarly, Phenix was given more than ample time to consider and object to the jury instructions including the offset to be applied and the allocation of the burden of proof. Early in the damages trial the Court solicited proposed instructions from and thereafter distributed its own draft instructions to all parties. [*See* Tr. 4277, 5460-61, 5740-41, J.A. 1412, 1651-52, 1682-83.] This was followed by two conferences on June 7 and June 10 among the Court and counsel to discuss the instructions, including the offset and burden of proof instructions, and to afford the parties opportunities to suggest changes and lodge objections. [Tr. 5824-25, 5890-959, J.A. 1695-96.] On June 12, 1985, the Court read its instructions to the jury. At no point during this process did Phenix make known any concern about, much less objection to, the District Court's rulings or instructions.

2. Phenix's agreement with the District Court's actions bars its present appeal.

Preclusion of appellate review is particularly apt when a party not only failed to object by silence, but also encouraged and agreed with the trial court's action. *See Mid-America Food Service, Inc. v. ARA Services, Inc.*, 578 F.2d 691 (8th Cir. 1978); *Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456, 459-60 (8th Cir. 1968). "[A] party cannot successfully complain of error for which he himself is responsible or of rulings which he has invited the trial court to make." *Mach v. Abbott Co.*, 136 F.2d 7, 10 (8th Cir.), *cert. denied*, 320 U.S. 773 (1943). *See also Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723, 727 (8th Cir. 1985) ("it is 'fundamental that where the defendant "opened the door" and "invited error" there can

[3] It did so in its pretrial brief on damages [Shearson's Brief on Damage Issues at 37-41, J.A. 89-92]; at the outset of the damages trial in its opening statement [Tr. 4223, J.A. 1403]; again during the trial, in a memorandum of law [Docket Number 658], and by its questioning of witnesses, without objection, to demonstrate that Phenix had been repaid $6.5 million [*See* Tr. 4341-44, 4969-70, J.A. 1440-43, 1539-40]; in its motion for a directed verdict [Tr. 5828-29, J.A. 1697-98]; and finally during summation. [Tr. 6112, 6114, J.A. 1750, 1752.]

be no reversible error.' ") (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)). Phenix's conduct fits squarely within this rule.

In his response to Shearson's motion for a directed verdict, Phenix's counsel told the Court "you've already subtracted, which we fully agree with, the six and a half million." [Tr. 5843, J.A. 1708.] During summation, counsel for Phenix twice told the jury that Phenix agreed with the $6.5 million offset. He told the jury "the damages which we are claiming, totals $20,600,324.57, and from that figure the Court will instruct you that you're not to consider the fact that he will subtract from this figure, and we fully agree with this calculation" [Tr. 6041, J.A. 1737] and later repeated that "the Court will instruct — which we agree with this instruction, will subtract $6.5 million from that which represents the money that we have received in the bond transaction." [Tr. 6042, J.A. 1738.] And during his rebuttal to Shearson's summation, Phenix's counsel summarized both his client's damages and, without disagreement, the manner in which the offset would be applied:

> When you look on the board, those are the figures which reflect our damages as they are today when you must consider them, and they total the 19 million, as I have stated; and when the Judge subtracts, as he will instruct you he will do, the 6.5, you will have the figure that we say we're damaged today.

[Tr. 6132, J.A. 1757.]

Moreover, as explained more fully below, during the damage trial Phenix did not claim the MTJ transaction was irrelevent. Phenix used the MTJ guarantee offensively as a basis to claim in excess of $7.9 million in damages. In that connection, Phenix was the first party to bring the matter to the jury's attention in the opening statement of its counsel and Phenix also introduced evidence concerning the transaction. [Tr. 4216, 4923-28, J.A. 1402, 1522-27.] Finally, Phenix affirmatively advised the Court that it had no objection to the

jury instructions allocating the burden of proof. [Tr. 5934, 5946, J.A. 1714, 1718; *see also* Tr. 5950, J.A. 1719.]

[Material Omitted]
[pp. 14-28]

4. The plain error rule is inapplicable.

Secondly, Phenix argues that the plain error rule is applicable. [Phenix Brief at 55-57.] As explained below, Shearson strenuously urges that no error was committed. But even if it were, the plain error rule is not available to Phenix. The rule is sparingly applied only "to the exceptional case in which error has affected seriously the fairness, integrity or public reputation of judicial proceedings." *Johnson v. Houser*, 704 F.2d 1049, 1052 (8th Cir. 1983); *Lange v. Schultz*, 627 F.2d 122, 128 (8th Cir. 1980); *Figge Auto Co. v. Taylor*, 325 F.2d 899, 907 (8th Cir. 1964). This is not such a case.

In cases where, as here, the appellant did not merely remain silent, but expressly told the court that it agreed with the challenged ruling or affirmatively stated that it had no objection, considerations of fairness and finality overwhelmingly demand that error should not give rise to appellate rights. *See Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985); *Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456 (8th Cir. 1968).[9] As explained more fully below, moreover, Phenix sought damages as a result of the MTJ transaction. Having lost on that claim, Phenix should not be permitted under the guise of the plain error rule now to reverse its strategy and claim error because it is dissatisfied with the result.

Insofar as Phenix contends that the burden of proof was misallocated, Eight Circuit cases demonstrate that the plain

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[9] In *Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23 (3d Cir. 1981), a case cited by Phenix, the court found plain error in jury instructions even though the appellant's counsel had said that he had no objections to the instructions. Phenix, however, did far more than simply state its lack of objection to the District Court's rulings. Moreover, the Eighth Circuit, unlike the Third Circuit, refuses to find plain error under such circumstances. *See Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456 (8th Cir. 1968).

error rule is not available here. In *Fulton v. Chicago, Rock Island & Pacific Railroad*, 481 F.2d 326 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973), for example, a railroad counterclaimed against a shipper for the collapse of the railroad's bridge caused when machinery loaded by the shipper struck the bridge during transport. After judgment was entered for the shipper, the railroad appealed on the ground that the trial court erred in instructing the jury that the railroad bore the burden of proving its freedom from contributory negligence. The Eighth Circuit refused to determine the merits of the railroad's appeal and held that the railroad had waived the burden of proof issue even though it had requested a specific instruction allocating the burden of proof to the shipper: "regardless of the substantive merits of this contention, [the railroad] failed to object after the charge was delivered to this particular instruction and it is therefore precluded from raising this issue on appeal." *Id.* at 338. Even the railroad's requested instruction did not "obviate the need for a specific statement of the alleged error." *Id. See also Farrar v. Cain*, 756 F.2d 1148, 1150 (5th Cir. 1985) (claim of alleged error in burden of proof instruction summarily rejected because no objection at trial).

In *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985), the appellant contended that the trial court erred in instructing the jury that the plaintiff needed to prove its case only by a preponderance of the evidence rather than by clear and convincing evidence. The Eighth Circuit, noting that the appellant not only had not objected to but also had included the preponderance standard in his requested instructions, held that the court "need not search for plain error, for it is 'fundamental that where the defendant "opened the door" and "invited error" there can be no reversible error.' " *Id.* at 727 (quoting *United States v. Steele*, 610 F.2d 504, 505 (8th Cir. 1979)). *See also Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411, 415-16 (8th Cir. 1985); *Cone v. Beneficial Standard Life Insurance Co.*, 388 F.2d 456, 459-60 (8th Cir. 1968) (Rule 51 "cannot be circumvented under the guise of

'plain error' " where appellant specifically told court that he had no objection to instructions).[10]

Finally, the plain error exception is not applicable unless the Court is convinced that the result would have been different if the burden of proof had been allocated differently. *See Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir.), *cert. denied*, 464 U.S. 850 (1983); *Sheppard Federal Credit Union v. Palmer*, 408 F.2d 1369 (5th Cir. 1969). *See also Johnson v. Houser*, 704 F.2d 1049 (8th Cir. 1983). Phenix has not demonstrated, as it must, that if the burden had been allocated to Shearson, the result would have been different. As explained in detail below, the evidence adduced concerning the future prospects and the value of the plant demonstrated that the plant would be successful, that the plant had a substantial market value and,

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[10] Phenix states that "federal courts of appeals applying the plain error standard have almost universally held that misallocation or mistatement [sic] of the burden of proof on an important issue constitutes plain error." [Phenix Brief at 56.] As demonstrated by *Federal Crop Insurance Corp. v. Hester*, 765 F.2d 723 (8th Cir. 1985), and *Fulton v. Chicago, Rock Island and Pacific Railroad*, 481 F.2d 326 (8th Cir.), *cert. denied*, 414 U.S. 1040 (1973), this Circuit has never adopted such a rigid rule.

Moreover, in the three Eighth Circuit cases cited by Phenix where this Court found plain error, *Smith v. Updegraff*, 744 F.2d 1354 (8th Cir. 1984), *Morris v. Getscher*, 708 F.2d 1306 (8th Cir. 1983), and *Mitchell v. Volkswagenwerk, AG*, 669 F.2d 1199 (8th Cir. 1982), none of which involved alleged errors in the trial court's allocation of the burden of proof, there was no indication that the appellant had specifically told the trial judge, as Phenix did here, that it had no objections to the manner in which the case was submitted to the jury.

Finally, in *Teen-Ed, Inc. v. Kimball International Inc.*, 620 F.2d 399, 401-02 (3d Cir. 1980), the other main case on which Phenix relies, before vacating the lower court judgment on the basis of an argument raised for the first time on appeal, the appellate court noted that neither the appellant nor the appellee had assisted the trial court in resolving the "very difficult evidentiary problem" at issue. Moreover, the court stated, that "[u]nder ordinary circumstances, perhaps, even this concert of activity would not be sufficient to vacate a judgment," but held that because the court's erroneous ruling had prevented appellant from *presenting* its damages case, a new trial was required. Here, on the other hand, the issues of Phenix's damage claims and the MTJ transaction were fully presented and no evidence concerning damages legally recoverable by Phenix was excluded from the jury.

accordingly, it was unlikely that Phenix would suffer any loss under its MTJ guarantee. *See* discussion at Point I(B)(3)(b) and Point II(B), *infra.*

For all these reasons, the plain error rule, like the other contentions Phenix makes to excuse its failure to object, is not available to Phenix.

B. The Offset Of $6.5 Million Against Phenix's Damages And The Court's Allocation Of The Burden Of Proof Concerning Such Damages Were Legally Correct.

Relying upon several different strands of authority, Phenix claims that as a matter of law it was error for the District Court to offset against the damage award the $6.5 million which Phenix received in the MTJ transaction. Additionally, Phenix contends that if the offset were not improper as a matter of law, the District Court erred in allocating to Phenix, rather than Shearson, the burden of proving that it would suffer damage under the MTJ guarantees. As demonstrated below, the rulings of the District Court concerning the offset and the burden of proof were correct and reversal would not be appropriate even if Phenix had preserved its objections.

1. Phenix has fundamentally revised the approach it took to the MTJ proceeds at trial.

In the opening page of its brief, Phenix criticizes the District Court for rejecting "appellant's contention that these bonds proceeds were irrelevant" and for placing on appellant "the burden to prove it would lose any of this money" under the MTJ guarantee. It then concludes that "in so doing, the District Court turned the law of mitigation of damages on its head and denied appellant any remedy for Shearson's wrong." These criticisms are based on the fundamental premise which Phenix asserts much later in its brief that "plaintiffs agreed not to claim any damages that occurred after December 26, 1984, the day before the closing on the MTJ bond issue." [Phenix Brief at 54.]

Based on that fundamental premise, in the remainder of its brief Phenix attempts to demonstrate that its receipt of the $6.5

million was irrelevant as a matter of law and could not be considered in reduction of its damages or, alternatively, if the MTJ transaction was relevant, it was relevant only to mitigation of damages and hence the burden of proving Phenix would not lose the $6.5 million should have been placed on Shearson. These contentions substantially and fundamentally mischaracterize the positions Phenix took with respect to the MTJ transaction during the damages trial.

During the damages trial Phenix in fact did not dispute that it had received and enjoyed the use and benefit of the $6.5 million and that such funds should properly reduce any overall recovery which Phenix obtained from the jury. Phenix conceded that the $6.5 million was an asset and that it could use such funds for any corporate purpose. [Tr. 4970, 5055, J.A. 1540, 1581.] It did not argue that it would lose part or all of the $6.5 million which it had received. Thus, contrary to what Phenix now suggests, the jury was not asked to determine whether Phenix would lose part or all of the $6.5 million, and the burden of proof was allocated to neither party on that issue.

Instead, Phenix contended that the MTJ guarantee gave rise to a separate additional damage claim of more than $7.9 million. During his opening and closing statements, Phenix's counsel explicitly told the jury that Phenix was seeking damages based upon the MTJ transaction. [Tr. 4215-16, 6039-40, J.A. 1401-02, 1735-36.] Consequently, the Court expressly charged the jury that Phenix was seeking several different kinds of consequential damages, including "the amount of principal and interest on the MTJ bonds that Phenix Federal will pay for which it will not be reimbursed." [Damage Instruction No. 39, J.A. 254-55.] Those damages were substantially more than and were not directly related to the $6.5 million which it concededly had received. Because Phenix was not contending that it would lose the benefit of the $6.5 million, but instead was pressing a separate claim for more than $7.9 million in damages based on its guarantee, Phenix agreed to the offset and accepted the burden of proof on the issue.

The reason Phenix seeks to portray the positions it took at trial in the way it now does is no mystery — it did not prevail on its claim for approximately $7.9 million in consequential damages for the MTJ transaction. Its indirect attempt to do so now should be rebuffed. In pressing the claim for damages under the guarantee, it was clearly Phenix's hope and expectation that it would recover in excess of $7.9 million and thus fare much better than if it merely claimed that the MTJ transaction was irrelevant.[11] Had Phenix prevailed on its MTJ guarantee claim, it would readily have accepted the benefits and presumably would not be complaining about the offset today. Having lost on the claim, however, it must be charged with the consequences of the positions it took. No blame can be placed on the District Court for the "extraordinary denouement" which Phenix complains has been reached. [Phenix Brief at 25.]

2. Neither the principles enunciated in the *National Steel* case nor the collateral source rule affect the propriety of the offset.

Phenix now claims that its receipt of $6.5 million was irrelevant to any issue and that even if it had not given a guarantee as part of the MTJ transaction it could retain that $6.5 million and still recover the full amount of the VBCA loans from Shearson. Phenix reaches this result by contending that its damages became fixed no later than December 1981 when

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[11] Phenix could not reasonably have claimed that it was entitled to damages under the MTJ guarantee and that Shearson was not entitled to offset the $6.5 million which Phenix had received. If it had done so, Phenix would have been seeking a possible recovery of not merely double but more than triple the amount of its loans to VBCA. As Phenix structured its damage claims, it sought approximately $7.2 million for the original and subsequent advances, including interest, and, in addition, approximately $7.9 million under the guarantee. If the offset had not been applied, Phenix would have been in the position of seeking in excess of $15.1 million (not including its other consequential damages) while at the same time retaining the $6.5 million it had received. As a result, if Phenix ultimately did not incur losses under its guarantee, it could well have recovered $15.1 million from Shearson although it had already received almost full repayment of its loans to VBCA. And even if Phenix were called upon to make payment under the guarantee, it would still be able to look to its mortgage on the plant.

"VBCA was unable to pay-off the $1.6 million interim loan" and that its damages could not have "un-accrued" as a result of the MTJ transaction. [Phenix Brief at 27-28.] In support of these contentions, Phenix relies principally upon *National Steel Corp. v. Great Lakes Towing Co.*, 574 F.2d 339 (6th Cir. 1978) ("*National Steel*"). Phenix further contends that the payments received by Phenix were from a collateral source and hence do not reduce its damages. [Phenix Brief at 43-46.] These contentions must be rejected for several reasons aside from the fact that they ignore the positions Phenix took at trial, including the way it structured its damage claims.

The *National Steel* case is inapposite. That case held that damages for a three day loss of use of a steel mill which had "already accrued" at the time plaintiff began its efforts to mitigate could not be reduced by above normal production after the three day period. *National Steel* thus holds that certain types of damages, once having accrued, cannot be reduced by subsequent events. *National Steel* did not hold that payments made to a plaintiff after a cause of action has accrued may never reduce plaintiff's damages or that a payee of promissory notes such as Phenix can sue other parties such as Shearson for damages equal to the face amount of the notes without regard to payments received prior to trial. Such subsequent payments up to the time of trial are relevant to reduce damages.

Indeed, there are many instances in which payments made to a plaintiff after a cause of action accrues and before the time of trial eliminate or reduce damages. For example, although a guarantor may be sued upon default of the primary obligor, repayment of the indebtedness by the primary obligor or on its behalf prior to trial relieves the obligation of the guarantor. *See Bledsoe v. Cargill, Inc.*, 452 So. 2d 1334 (Ala. Civ. App. 1984); *Industrial Development Corp. v. Rocca*, 100 Idaho 228, 596 P.2d 100 (1978), *later appeal*, 102 Idaho 920, 643 P.2d 1090 (1982). Shearson's liability to Phenix may be viewed as analogous to that of a guarantor of the obligation of VBCA. It arose only because the promissory notes were not paid in a timely manner. Additionally, where more than one defendant

may be liable to a plaintiff for the same injury, whether in tort, contract or otherwise, payment by one defendant either in a settlement prior to trial or in satisfaction of judgment, reduces the liability of the other defendants to the plaintiff. *See, e.g., Wadle v. Jones*, 312 N.W.2d 510, 514 (Iowa 1981); *Brigdon v. Covington*, 298 N.W.2d 279, 280 (Iowa 1980); *Greiner v. Hicks*, 231 Iowa 141, 300 N.W. 727, 731 (1941); *Mulinix v. Saydel Consolidated School District*, 376 N.W.2d 109, 111 (Iowa Ct. App. 1985); *see also Syverson v. Heitmann*, 171 Cal. App. 3d 106, 110, 214 Cal. Rptr. 581, 584 (3d Dist. 1985) ("Where a plaintiff's settlement completely offsets the damages assessed against a nonsettling joint tortfeasor, it reduces the judgment to zero by operation of law."). Phenix may not avoid this rule simply because it did not sue VBCA, the primary obligor under the promissory notes.

Indeed, there are other examples as well. Thus, in an action for conversion, where payment has been made to the injured party for the property converted by the person in possession, the amount of that payment must be offset against any damages awarded the plaintiff against a defendant found liable for the conversion. *See Keota Produce Co. v. Chicago, Rock Island & Pacific Railroad*, 189 Iowa 1284, 179 N.W. 834, 835 (1920). *See also Thornton & Co. v. Gwinnett Bank & Trust Co.*, 151 Ga. App. 641, 260 S.E.2d 765, 769 (1979)(in an action for conversion against bank which paid out funds on forged instrument, bank was entitled to a setoff for amounts repaid by forger); *DoAll Dallas Co. v. Trinity National Bank*, 498 S.W.2d 396, 404 (Texas Ct. App. 1973 — writ ref. n.r.e.) (same).

Contrary to Phenix's contention, its actual damages did not accrue in respect of the $1.6 million loan in December 1981. Instead, the amount of its damages, if any, could not be determined until the time of trial. Accordingly, it would not have been sufficient for Phenix to have shown that it had not been paid in December 1981. Phenix was required to prove that as of the time of trial its loans to VBCA had not been paid. In recognition of this fact, Phenix's principal witness, Carroll Sasser, was not merely asked whether Phenix had been repaid in December 1981, but whether VBCA's indebtedness re-

mained outstanding at the time of trial. [Tr. 4927, 5052-53, J.A. 1526, 1578-79.]

If it were assumed that VBCA had secured permanent financing from a source other than Shearson in early 1982 or at some other time before trial and had used that financing to repay Phenix, the fallacy in plaintiff's argument becomes apparent. In that event, Phenix could not have recovered from Shearson or from VBCA. Phenix could not reasonably contend in that event, as it seeks to do now, that its damage claims against Shearson became fixed in December 1981, that repayment was from a collateral source and, therefore, it could still maintain an action against Shearson to obtain full recovery. Yet, that is exactly what happened through the MTJ transaction. Permanent financing was obtained which was used to repay Phenix.

In addition, Phenix's contention that its damages accrued in December 1981, became fixed at that time and were not subject to reduction is inconsistent with its claim for post-December 1981 advances. At trial, Phenix contended that after December 1981, it advanced more than $3.7 million in a "reasonable effort from the standpoint of a prudent lender, to recoup Phenix's original loan of $1.6 million." [Damage Instruction No. 43, J.A. 261A.] Stated otherwise, Phenix claimed that it made the subsequent advances to mitigate its original $1.6 million loss. Thus, Phenix conceded that if it had recovered the original $1.6 million as a result of the subsequent advances — by making the plant successful and enabling VBCA to repay the $1.6 million — it would have mitigated its damages in respect of the $1.6 million and could not have recovered those loans from Shearson. This makes clear that Phenix's damages were not fixed, absolute and immune from reduction as Phenix now claims.

For the same reasons, the collateral source rule is also inapplicable to the $6.5 million payment.[12] In addition, neither

[12] This is not, as Phenix claims, "a classic collateral source payment" situation. [Phenix Brief at 43.] The facts here are a far cry from the cases in which the collateral source rule developed. The collateral source rule is an

VBCA nor MTJ are collateral sources. Phenix received the $6.5 million from the parties which owed the debt.[13] Discharge of loans by, or on behalf of, the borrower cannot be considered a collateral payment. *See Huber, Hart & Nichols, Inc. v. Moore*, 67 Cal. App. 3d 278, 304, 136 Cal. Rptr. 603, 619 (5th Dist. 1977).

In sum, neither the principles set forth in the *National Steel* case nor the collateral source rule are applicable.

[Material Omitted]

[pp. 30-37]

b. Phenix's contingent obligation under its MTJ guarantee was not too speculative to be evaluated by the jury.

The factors the jury was instructed to consider in evaluating Phenix's potential loss under the guarantees, including the value and success of the plant, were not too speculative. [Damage Instruction No. 41, J.A. 258-59.] First, there was ample evidence to support a jury finding that the plant had substantial value to which Phenix could look if it had been

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exception to the general principle that an injured party is entitled to recover only for damages actually sustained. The rule typically applies to insurance payments received by personal injury claimants which were contracted for in advance or to employment benefits, such as sick leave payments, provided voluntarily. *See, e.g., Stewart v. Madison*, 278 N.W.2d 284, 293-94 (Iowa 1979) (rule applied to automobile insurance payments); *Rigby v. Eastman*, 217 N.W.2d 604, 609 (Iowa 1974) (rule applied to workmen's compensation payments); *Clark v. Berry Seed Co.*, 225 Iowa 262, 271, 280 N.W. 505, 510 (1938) (rule applied to payment of medical expenses by employer). It is intended primarily to preserve the rights of subrogation and the benefits of insurance for those who have purchased coverage. D. Dobbs, *Handbook on the Law of Remedies* § 3.5, at 185-86 (1973).

[13] Phenix contends that the $6.5 million did not discharge VBCA's indebtedness and therefore VBCA still owes approximately $5.3 million plus interest for the loans made before December 27, 1984. [Phenix Brief at 33-34.] Phenix, however, is not entitled to keep and use the $6.5 million as an asset without crediting it against the debts of the parties from which it was received. Indeed, in apparent recognition of this fact, Phenix agreed that it would not seek to recover for the VBCA loans unless MTJ defaulted on its bond obligations. [Ex. 1654 at Art. 1.6 J.A. 647; Tr. 4343-44, J.A. 1442-43.]

called upon to make payments under the guarantees. Thus, the jury determined that the market value of the plant was $6.5 million as of December 1981. [Phenix Damage Interrogatory No. 8, J.A. 291.] As set forth below, there was overwhelming evidence to support this determination. *See* discussion at Point II(B), *infra.* Plaintiffs contended that by 1985, material improvements had been made in the plant [*See* Tr. 4290, 4297-301, 4345, J.A. 1420, 1422-26, 1444] which must have increased its value.

In addition, the future success or profitability of the plant was not, as a matter of law, incapable of proof as Phenix now contends. In 1984, the Iowa Supreme Court overturned the new business rule which previously barred recovery of damages based on future profits of a new business. *See Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984). Upon a proper showing, courts in Iowa and in various other jurisdictions permit recovery of lost future profits even though the proof of such profits involves uncertainty. *See, e.g., Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2d Cir. 1970); *Galindo v. Hibbard*, 106 Idaho 302, 678 P.2d 94 (Ct. App. 1984); *Cook Associates v. Warnick*, 664 P.2d 1161 (Utah 1983); *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260 (Minn. 1980).[15]

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[15] Phenix relies on *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550 (Iowa 1980), *Groesbeck v. Napier*, 275 N.W.2d 388 (Iowa 1979), and *Stanley v. State*, 197 N.W.2d 599 (Iowa 1972), for the proposition that the plant's prospects were too speculative as a matter of law to be capable of proof. None of those cases involved future lost profits which, under *Harsha*, is now a matter capable of proof. In addition, here, Phenix had already received the MTJ proceeds. None of the above cases involved a comparable situation in which payment had already been made to the plaintiff, but only situations in which funds might possibly be received in the future.

Phenix also cites to *Great Lakes Gas Transmission Co. v. Grayco Constructors, Inc.*, 506 F.2d 498 (6th Cir. 1974), *cert. denied*, 420 U.S. 947 (1975), and *Randall v. Loftsgaarden*, 106 S. Ct. 3143 (1986). In *Great Lakes Gas*, the court held that the District Court properly excluded as speculative evidence concerning a gas company's pass-along to the public of repair costs resulting from the appellant's negligence through increased rates because the gas company's rates were highly regulated and could be readjusted. In *Randall*, the court held that tax benefits realized by defrauded investors would not be

Virtually the only proof adduced on the issue tended to show that the plant would become profitable after it reopened in 1985. For example, Leonard Conrad testified that he believed that by January 1985, many of the plant's problems had been solved and that the plant would thereafter be successful. Specifically, he testified that the equipment was substantially improved, the interest rate on the plant's indebtedness had been lowered and his ability to manage the plant had improved because of the experience he had gathered during the past three years. [Tr. 4297-301, 4303, 4341, 4345-48, J.A. 1422-26, 1427, 1440, 1444-47.] Additionally, Shearson introduced, without objection by Phenix, detailed MTJ projections prepared by Russel Ninas, the accountant employed by both Phenix and Conrad. They projected that during 1986 the plant would be able to fully cover payment of interest and principal on the MTJ bonds, including that portion which was past due.[16] [Tr. 4357-58, 5255-57, J.A. 1451-52, 1641-43; Ex. 1699, J.A. 783-94.] Such projections can be sufficient to support a jury verdict of lost profits. *See, e.g., International Wood Processors v. Power Dry, Inc.*, 792 F.2d 416, 431 (4th Cir. 1986); *G.M. Brod & Co. v. U.S. Home Corp.*, 759 F.2d 1526, 1538-39 (11th Cir. 1985); *Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984). This is particularly true where, as here, the projections are offered against the party that prepared them or relied on them in making business decisions. *See Perma Research & Development Co. v. Singer Co.*, 402 F. Supp. 881, 900 (S.D.N.Y. 1975), *aff'd*, 542 F.2d 111 (2d Cir.), *cert. denied*, 429 U.S. 987 (1976).

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used to offset their damages because of the "substantial" burden of reconstructing the investors' tax histories. Here, by contrast, the possibility that Phenix would sustain losses under its guarantee depended on the future profitability of the plant, which the Iowa Supreme Court in *Harsha* held was not too speculative for proof, and on the value of the plant, about which there was extensive evidence.

[16] While Phenix now emphasizes the disclaimer included in the projections [Phenix Brief at 41 n.32], this argument misses the point. Shearson does not contend that the projections were a guaranty of future success. Presumably, however, they were conscientiously prepared by plaintiffs and constitute one basis on which Phenix made important decisions concerning the plant including its decision to make the interest payments on which MTJ defaulted. The weight to be accorded to the projections was a matter for the jury to determine.

The principal evidence on which Phenix relied to show possible losses under the guarantee was the fact that MTJ had been unable to make the initial interest payment on the bonds in January 1985.[17] [Tr. 4929, 5041, 5047, J.A. 1528, 1572, 1577.] This evidence had almost no probative value. All of the witnesses who addressed the issue testified that an alcohol plant could not be expected to be profitable in its early months of operations. [Tr. 4603-04, 4854, 5194, 5489, J.A. 1467-68, 1474, 1613, 1653.] Consistent with this testimony, the MTJ projections predicted that the plant would incur losses in its early months and would turn profitable thereafter. [Ex. 1699, J.A. 783-94.] Phenix made no attempt to impeach the projections and offered not a scintilla of evidence that MTJ would not be profitable following its shake-down phase.

Phenix relies heavily on the fact that the District Court disallowed the jury awards of lost profits to VBCA for 1982 and 1983 as demonstrating that the plant's prospects for the post-1985 period must have been incapable of proof. [Phenix Brief at 42-43.] Phenix misconstrues the rationale for the District Court's decision. The District Court did not hold that the 1982 and 1983 lost profits were incapable of proof as a matter of law. Rather it held that VBCA had failed to introduce such proof and that other proof which was offered demonstrated as a matter of law that the plant could not have been profitable during those years. The evidence concerning the plant's post-1985 prospects had none of those failings which the Court found decisive in vacating the award for 1982 and 1983 lost profits.[18] [*See* Decision at 7-8, J.A. 468-69.]

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[17] Phenix also briefly questioned Carroll Keim, Shearson's expert, to clarify his testimony that in his judgment an ethanol plant with a 2.5 million gallon capacity, such as the Bonaparte plant, as a general matter is not economically feasible. [Tr. 5506-08, J.A. 1655-57.] Even before the plant reopened after the MTJ bond issue, however, its capacity had been increased to 3.5 million gallons. [Tr. 4352, J.A. 1449.] Moreover, Keim qualified his testimony by stating that the profitability of a plant depends in each case on several variables and by citing to another plant with a 2.5 million gallon capacity which had been "extremely successful." [Tr. 5506-07, J.A. 1655-56.]

[18] Phenix refers to design and conception flaws in the plant and the fact that Ninas' projections concerning MTJ's future operations could not be

Finally, Phenix refers to statements of Shearson's counsel during summation as showing it was impossible for the jury to determine the future success of the plant. [Phenix Brief at 40.] The thrust of those arguments was, as explained above, that Phenix had offered no persuasive evidence to carry its burden of proving that the plant would not be successful and that the only available evidence tended to show the opposite. Those arguments remain valid.

In sum, the likelihood that Phenix would sustain loss under its guarantee was a factual matter capable of proof, which the jury determined against Phenix. There was ample evidence to support the jury's finding.

4. The District Court correctly allocated the burden of proof to Phenix.

Phenix now contends that if the receipt of the MTJ funds was relevant, it was a matter of mitigation and that the burden of proof should have been placed on Shearson to demonstrate that it would not lose those funds. [Phenix Brief at 46-56.] It further claims that because the future prospects of the plant and its ability to repay the principal and interest on the bonds was too speculative to be susceptible of proof, Shearson could not have met that burden, that a new trial is not required and that judgment should be entered in its favor for the full amount of the jury award. [Phenix Brief at 58-59.]

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verified by actual operating data in arguing that "the prospects of the plant through the year 2004 were not (and could not be) shown with reasonable certainty." [Phenix Brief at 43.] It is surprising, to say the least, that Phenix would have participated in the MTJ transaction and assumed financial exposure in that regard if it believed the plant had design flaws. In any event, by 1985, any faulty equipment had been replaced and the plant upgraded. [Tr. 4298, 4300-01, 4344-47, J.A. 1423, 1425-26, 1443-46.] In addition, the assumptions on which Ninas based his MTJ projections differed from the assumptions in the original 1981 VBCA projections and reflected the plant's actual operations as well as Conrad's three years of experience with ethanol production. [Tr. 4359-60, J.A. 1453-54; Ex. 1699 at 2-3, J.A. 784-85.] Iowa law does not require anything more. *See Harsha v. State Savings Bank*, 346 N.W.2d 791 (Iowa 1984).

In the first place, Phenix concedes that "on [the burden of proof] issue there was admittedly no trial objection." [Phenix Brief at 55.] As demonstrated above, Phenix may not invoke the plain error rule to avoid this failure and consequently is barred from raising the issue for the first time now. *See* discussion at Point I(A)(4), *supra.*

Moreover, it is clear that because of the way Phenix structured its damage claims, the burden of proof properly rested with Phenix. As explained above, Phenix did not frame the issue for jury determination in the way it now does. It did not request that the jury be instructed to determine what portion of the $6.5 million Phenix would retain. The jury was not instructed to and did not resolve that issue and the burden of proof on that issue was not allocated to either party. Instead, Phenix affirmatively sought more than $7.9 million in damages on the basis of the MTJ guarantees. That was the issue the jury was instructed to and did determine. As with all of its damage claims, Phenix bore the burden of establishing damage and the amount thereof. [Damage Instruction Nos. 40 and 50 J.A. 256-57, 265-66.] *See Sedco International, S.A. v. Cory*, 522 F. Supp. 254, 322 (S.D. Iowa 1981), *aff'd*, 683 F.2d 1201 (8th Cir.), *cert. denied*, 459 U.S. 1017 (1982).

The allocation of the burden of proof was correct for another reason. Even if Phenix were allowed on this appeal to rewrite what happened at trial and to characterize the MTJ transaction as relevant only to affirmative defense issues, Shearson did meet its burden. Shearson's burden was to demonstrate that Phenix received the $6.5 million. This fact was demonstrated without dispute and as a matter of law. [*See, e.g.*, Tr. 4341, 4969-70, J.A. 1440, 1539-40.] If Phenix had contended that it would not retain the $6.5 million and therefore did not benefit from its receipt of the funds, the burden rested with Phenix to prove that contention.

Phenix has not cited a single case in which a defendant has been required to prove not only receipt of funds by plaintiff which mitigate damages, but that plaintiff will thereafter not

lose the benefit of such funds.[19] The cases relied on by Phenix in which the burden of proof has been placed on the defendant to prove a mitigating offset to the plaintiff's damages support this reasoning. [*See* Phenix Brief at 48-49.] In those cases in which an offset was allowed, the burden of proof was met by establishing that the credit or other offset payment was actually paid to and received by the plaintiff. *See, e.g., Cates v. United States*, 451 F.2d 411, 417-18 (5th Cir. 1971). *See also Wadle v. Jones*, 312 N.W.2d 510, 515 (Iowa 1981). Shearson met its burden in this regard when it demonstrated that Phenix received a payment of $6.5 million in the MTJ bond offering.[20]

[Material Omitted]

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[19] *National Steel* did not reach this question. At most, the court held that a defendant has the burden of proving the receipt of funds that mitigate the plaintiff's damages, not that the funds received were not thereafter lost. *See* 574 F.2d at 344-45.

[20] Phenix contends that if this Court were to accept its various contentions, a new trial would not be necessary. Instead it asks the Court simply to enter judgment on the jury verdict. [Phenix Brief at 58-59.] Because of the importance of the MTJ transaction to the trial insofar as it concerned Phenix's damages and Phenix's role in eliciting or, at a minimum, acquiescing in the actions which it now challenges, Phenix's request should be rejected. Moreover, a new trial would also be required because it is impossible to know that the jury instruction that Phenix's damages would be reduced by $6.5 million had no effect on the jury's deliberations.

RESPONDENT'S APPENDIX 3

EXCERPTS FROM DISTRICT COURT'S JURY INSTRUCTIONS

INSTRUCTION NO. 39

Phenix Federal's claim for general damages consists of the 1.6 million dollar construction loan it made before learning that Shearson was not going to provide permanent financing for the Van Buren County Alcohol plant. It is for you to determine the amount of general damages Phenix Federal has sustained as a result of Shearson's failure to provide permanent financing.

In addition, Phenix Federal claims several different kinds of consequential damages, as follows:

1. Loss of interest on the 1.6 million dollar loan that accrued after Phenix Federal knew that Shearson was not going to provide long-term financing for the Van Buren County Alcohol plant.

2. Advancements and interest on the advancements to Van Buren County Alcohol for equipment and operating expenses after Phenix Federal knew that Shearson would not provide permanent financing.

3. Expenses incurred by Phenix Federal in overseeing the operations of the Van Buren County Alcohol plant.

4. Loss due to the decrease in the value of Phenix Federal stock because of Shearson's failure to provide long-term financing.

5. Losses that are contingent on success of the plant, the value of the plant, and the guarantees of Leonard Conrad and Van Buren County Alcohol, consisting of the amount of principal and interest on the MTJ bonds that Phenix Federal will pay for which it will not be reimbursed under the guarantees or the plant mortgages, reduced to present value.

It is for you to determine which, if any, of these claims for consequential damages were the result of Phenix's reliance on Shearson's negligent misrepresentations as explained in instructions *38-48*, or promissory estoppel, as explained in instructions *49-53*. There will be a separate interrogatory for each claim of consequential damages. You should place the amount of damages you determine in the appropriate space.

INSTRUCTION NO. 40

In order to recover any amount of damages for negligent misrepresentation, Phenix Federal must establish by a preponderance of the evidence each of the following propositions as to each item of damages:

1. That Phenix Federal acted in justifiable reliance in taking the action that resulted in the damages as explained in Instruction No. *42*;

2. That the particular plaintiff's reliance on the negligent misrepresentations was the proximate cause of the damages, as explained in Instruction No. *4*;

3. That Phenix Federal's reliance on the negligent misrepresentations was the legal cause of the damages, as explained in Instruction No. *43*;

4. That the amount of damages is reasonably certain, as explained in Instruction No. *44*; and

5. That the damages were sustained by the specific plaintiff claiming the right to recover, as explained in Instruction No. *45-46*.

Each of these propositions must be proved for each item of damages. Where more detailed instructions are necessary with reference to a particular item of damages, they will be included in the appropriate place.

If you find that Phenix Federal has established each of these propositions by a preponderance of the evidence as to one or more of the items of damages they claim, you must then determine the amount to be awarded for each item, but in no event can the amount be in excess of the amount claimed. If you find that Phenix Federal has failed to prove any of these propositions, by a preponderance of the evidence as to one or more of the items of damages claimed, then your verdict must be for Shearson as to that particular damage claim.

INSTRUCTION NO. 44

In order to recover damages on the negligent misrepresentation claim, Phenix Federal must prove the fact and amount of damages in accordance with Instruction No. *23.*

INSTRUCTION NO. 45

In order to recover any damages for negligent misrepresentation, Phenix Federal must show that it actually suffered the damage claimed. No plaintiff is permitted to recover for another plaintiff's losses. The plaintiffs have the burden of proving which of them sustained each injury. If Phenix Federal fails to prove that it sustained a particular loss claimed, then it may not recover for that loss.

RESPONDENT'S APPENDIX 4

Excerpts From Shearson's Brief In Resistance To Phenix's Motion To Amend Judgment Or For A New Trial

Filed October 9, 1985

[Caption and Table of Contents Omitted]

[p. 2]

Shearson has filed a Resistance to Phenix Federal's Motion to Amend Judgment or, in the alternative, for a New Trial. This Brief sets forth Shearson's position on the following issues: (1) Phenix Federal did not object to the damages instructions and thus has no standing to complain about those instructions, (2) the Court correctly submitted the issue of Phenix Federal's general damages, (3) the Court properly ruled on Plaintiffs' pretrial motions, and (4) the Court ruled correctly on the evidentiary issues complained of by Phenix Federal and, in any event, even if the rulings were incorrect, they do not provide a basis for an amended judgment or a new trial under the facts of this case.

[Material Omitted]

[pp. 3-4]

II. THE COURT CORRECTLY SUBMITTED THE ISSUE OF PHENIX FEDERAL'S GENERAL DAMAGES.

Paragraphs 1, 2, and 3 of Phenix Federal's Motion and pages 2-5 of its brief assert that the Court should have submitted Phenix's general damage claim in some different way. As noted above, this argument is groundless because of Phenix's failure to object to the jury instructions. Second, this argument is groundless because the Court properly submitted all appropriate individual damage claims made by Phenix Federal. The Court submitted these individual items of damages because these were the losses claimed by Phenix. Phenix appears to argue that it is entitled to some amorphous general damage claim that is not tied to any specific damage. The law does not allow Phenix to present to the jury this type of unspecified damages claim. *See* Restatement (Second) of Torts § 552B. *Cf. Lenard v. Argento*, 699 F.2d 874, 888-92 (7th Cir. 1983) (Plaintiff cannot recover "substantial damages" that are not tied to any specific actual damages). Clearly, Phenix cannot recover on any such amorphous claim, and the Court correctly submitted Phenix Federal's general damage claim.

[Material Omitted]

RESPONDENT'S APPENDIX 5

EXCERPTS FROM SHEARSON'S RESPONSE TO PHENIX'S POST-TRIAL MOTIONS

Filed December 27, 1985

[Caption and Table of Contents Omitted]
[pp. 1-5]

On October 10, 1985, Phenix Federal filed an "Amendment to Brief in Support of Motion to Amend Judgment or, In the Alternative, Motion for a New Trial." Because this Amendment was filed one day after Shearson's Resistance to Phenix Federal's Motion, Shearson files this Response to Phenix Federal's Brief.

Phenix Federal asserts two principal bases for its post trial motions — the Court's failure to submit an interrogatory allowing the jury to award an amorphous amount of "general damages" and the Court's jury instruction providing that the $6.5 million received from the MTJ bond issue must be set off from Phenix Federal's damages. However, as Shearson pointed out in its Resistance, Phenix Federal cannot now raise these complaints because they were not made at the appropriate time — at trial. See Shearson's Resistance at pages 2-3. Phenix Federal's failure to make any objections it had at the time clearly required by Rule 51 of the Federal Rules of Civil Procedure and the cases decided thereunder precludes it from now raising this issue and claiming error. Even if Phenix Federal could somehow ignore the dictates of Rule 51 and assert its claims at this time, Phenix Federal would still be unable to obtain the post judgment relief it seeks.

A. General Damages

Phenix Federal complains that it was not allowed to recover all of its "general damages" because the Court sub-

mitted as individual items of damage all of Phenix Federal's claimed specific losses. Phenix Federal's assertion that it was entitled to more than the sum of its individual damage claims indicates a misunderstanding of the Iowa law on "general damages". The cases cited in Phenix Federal's brief in support of its general damages proposition are cases decided pursuant to Georgia statutory definitions, and they have no relevance to this case. *See Hood v. Dunn & Bradstreet, Inc.*, 486 F.2d 25 (1973); *Hayes v. Irwin*, 541 F. Supp. 397 (S.D. Ga. 1982). Iowa damages cases specifically provide that "no rule of law should permit an injured party . . . to receive more than has been lost as the result of some tortious act." *Adams v. Deur*, 173 N.W.2d 100, 105 (Iowa 1969).

Additionally, Phenix Federal's argument misconstrues the meaning of the term "general damages". General damages are not some additional, amorphous category of damages in a fact situation such as the case at bar. Instead, general damages are those suffered by all injured parties in the same circumstances — a category of damages distinguished from special or consequential damages, which are those additional damages suffered by a particular injured party as a result of the breach. *See* R. Hillman, *Contract Remedies, Equity, and Restitution in Iowa* § 6.1, at 126 (1979). In this case Phenix Federal was allowed to assert claims for any and all damages that would be suffered by all injured parties in the same circumstances. Phenix Federal made claims for loss of principal and interest — loss of the "value" of its expectation from Shearson — and that is all that Phenix Federal is entitled to recover under the principal of general damages.[1] See *id.* The principle of general damages, then, does not allow Phenix Federal to recover any additional damages under the facts of this case.

[1] The court (correctly) submitted the damages issue on special interrogatories. This submission resulted in the general damages being broken into specific damage figures. However, a totalling of these specific figures still results in a total that constitutes general damages as provided for by law.

B. Collateral Source Rule

Further, the collateral source rule clearly does not provide Phenix a basis for a new trial in this action. In this case, actions were taken by the plaintiffs to mitigate damages by obtaining new funding for the plant. *See Iowa Power & Light Co. v. Board of Water Works Trustees*, 281 N.W.2d 827, 833 (Iowa Ct. App. 1979); *Nizzi v. Lavery Sprayers, Inc.*, 143 N.W.2d 312, 317-18 (Iowa 1966) (Iowa law requires parties to mitigate their damages). The result of these actions was the repayment of most of the contractual debt owed to Phenix.[2] *See* Sasser Testimony at 4969-70. Having been repaid $6.5 million, Phenix could not recover these funds a second time from VBCA or MTJ, the principal obligors, much less a second time from Shearson, a party who became liable to Phenix only because VBCA had initially defaulted on its promissory notes.[3] In short, through the bond issue Phenix has received $6.5 million in repayment of the contractual indebtedness owed to it and it is not entitled to a double recovery of these sums from any party, be it VBCA or Shearson. *See Team Central, Inc. v. Teamco*, 271 N.W.2d 914, 925 (Iowa 1978).

It is apparent that the facts here are a far cry from the cases in which the collateral source rule developed. That rule has

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[2] In its Brief, Phenix refers to the MTJ bond issue as a "loss spreading mechanism" instead of a repayment. Phenix Brief at 4. Phenix's characterization is just that, as the evidence demonstrated that Phenix received $6.5 million as a result of the bond issue. To refer to the receipt of this money as simply "loss spreading" is not an accurate reflection of the facts.

[3] As indicated, Shearson became liable to repay the debt to Phenix only as a result of the default of the primary obligors. It is black letter law that repayment of an obligation discharges a party secondarily liable to the extent of repayment. *Bledsoe v. Cargill, Inc.*, 452 So. 2d 1334 (Ala. Civ. App. 1984); *Industrial Investment Corp. v. Rocca*, 596 P.2d 100 (Idaho 1978), *appeal after remand*, 643 P.2d 1090 (1982); *Spencer v. American Advisory Corp.*, 338 So. 2d 62 (Fla. App. 1976), *cert. denied*, 348 So. 2d 953 (Fla. 1977). This is true whether the payment is made by the primary debtor or by a third party on behalf of the primary debtor. 38 C.J.S. Guaranty § 77 (1943); *see also Brunson Bonding & Insurance Agency, Inc. v. Floyd Electric Co.*, 416 So. 2d 558 (La. App. 1982). Moreover, because MTJ was a primary obligor it was not a collateral source and, hence, the collateral source rule could not be applicable to any funds received by Phenix from MTJ. *Huber, Hunt & Nichols, Inc. v. Moore*, 136 Cal. Rptr, 603, 619 (Cal. App. 1977).

generally been applied to payments received by personal injury claimants from insurance companies, which payments had been contracted for in advance, or from employers on a voluntary basis. As Dan Dobbs has noted in his treatise on remedies, the collateral source rule "finds its most common application in personal injury cases" and is intended to preserve the rights of subrogation and the benefits of insurance for those who have purchased coverage. D. Dobbs, *Handbook on the Law of Remedies*, § 3.5, at 185-86. Dobbs notes that the rule "is in fact retained less on the basis of the arguments [in its favor] than on the basis of its value in financing personal injury litigation." *Id.* § 8.10, at 584. The rule clearly has no application to the facts presented here for all of the reasons indicated.

[Material Omitted]

Supreme Court
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No. 88-953

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PHENIX FEDERAL SAVINGS & LOAN ASSOCIATION, F.A.,
Petitioner,

vs.

SHEARSON LEHMAN HUTTON, INC.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Shearson's Brief in Opposition (hereinafter "Opp.") demonstrates that certain propositions are uncontroverted. Phenix Federal's post-verdict motion to alter or amend the judgment under Fed.R.Civ.P. 59 did not implicate the jury's fact-finding in any way. Shearson does not dispute that the propriety of the offset was solely a matter of law for the court; a post-verdict decision not to offset the damage award would not have necessitated a new trial. Nor does Shearson dispute that the trial court refused to consider the Rule 59 challenge to the offset because Phenix Federal failed to object to Instruction No. 41. The trial court concluded that, by virtue of Fed. R. Civ. P. 51, this failure to object precluded post-verdict review.

There is also no question that the Eighth Circuit concluded that this was indeed the effect of Rule 51. The court of appeals observed:

> [Phenix] makes legal arguments against the offset of the bond proceeds against its award, but we do not need to reach them, for Phenix failed to object to the jury instruction it finds offensive and has therefore failed to preserve the alleged error for review.

(App. A-10). The Eighth Circuit addressed and rejected the argument that Rule 51 waiver standards were inapplicable.

> Phenix argues that it appeals not from the instruction, but from the Court's action in entering judgment for an amount less than the verdict. The Court told the jury that it, the Court, would reduce the jury's damages verdict by $6.5 million. This, the argument runs, was not an explanation of the law made to guide the jury's deliberation, but a declaration of the court's intent to offset the jury's verdict; thus it was not a "jury instruction."
>
> We reject this argument. The instruction explained the law applicable to the case, as all jury instructions do. The Court instructed the jury that the law in this case required the offset, regardless of what it found Phenix's damages to be. If Phenix disagreed with this statement of applicable law, it should have objected to the instruction.

(App. A-10 n.2).

The flaw in the Eighth Circuit's reasoning is apparent. Had the district court not informed the jury of the offset — rather than announce the offset and then instruct the jury to ignore it — the Eighth Circuit's logic suggests the propriety of the offset would have been reviewable under Rule 59. Yet there is no coherent rationale, rooted in considerations of judicial efficiency or substantial fairness, to distinguish the two situtations.

Shearson does not dispute that the Eighth Circuit held that Rule 51 bars post-verdict review under Rule 59 of a pure question of law. Nor does it attempt to defend the logic of that holding. Rather Shearson propounds the novel proposition that the "Court of Appeals considered the merits independently of the jury instructions and ruled on the basis of the applicable state law" (Opp. i) — despite the court's statement that it did not have to do so. This eleventh hour revisionism is belied both by what the Eighth Circuit said and what it did not say.

The Eighth Circuit clearly held that because of the failure to object to Instruction No. 41, it did not have to reach Phenix Federal's "legal arguments against the offset of the bond proceeds against its award." The court did not cite, let alone analyze, any authority bearing on the propriety of the offset. In announcing there was no "plain error," the court of appeals characterized Instruction No. 41 as "arguable" as opposed to "egregiously wrong." Clearly the court of appeals elected not to settle this "argument" because, under Fed.R.Civ. P. 51, it concluded that it had no obligation to do so.

If an appellate court gives a legal proposition plenary consideration, it is either "right" or "wrong." It is apparent that the Eighth Circuit did not give plenary consideration to Phenix Federal's legal arguments against the offset. Therefore, this case squarely presents the issue whether Rule 51 precludes plenary reconsideration by the trial court of a pure question of law that is wholly independent of the jury's fact-finding.[1]

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[1] Shearson predicates its argument that the Eighth Circuit gave plenary consideration to the legal propriety of the offset on the court of appeals' statement: "[U]nder the applicable law Phenix was entitled to whatever it had lost on the loans to Van Buren County Alcohol, plus what it would lose on the letter of credit in the MTJ deal, less what it had received from that deal, $6.5 million." (App. A-11). As is obvious from footnote 2 of the opinion, which is quoted on page 2 *supra,* the court used the phrase "applicable law" to refer to the law articulated in the jury instructions. Indeed, if the court had concluded that Instruction No. 41 was correct, it would have made little sense to characterize it as "arguable."

The second proposition that dominates Shearson's response is its contention that "there is no confusion or lack of uniformity among the federal courts as to how the failure to object to jury instructions should affect post-trial motions." Yet Shearson fails to confront the obvious conflict between this case and the Sixth Circuit's *Solomon v. United States*, 276 F.2d 669 (6th Cir.), *cert. denied*, 364 U.S. 890 (1960) — let alone the hesitant and ambiguous articulations of the "law of the case" doctrine found in cases such as *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471 (10th Cir. 1985), and *Rakovich v. Wade*, 850 F.2d 1180 (7th Cir.), *cert. denied*, 109 S.Ct. 497 (1988).

The Sixth Circuit in *Solomon* reached a purely legal contention raised by a motion for new trial that had not been raised previously, even though that argument was inconsistent with jury instructions to which there had been no objection. Shearson lamely responds that the Sixth Circuit, after giving plenary consideration to the argument, did not reverse. But what is significant is that the Sixth Circuit gave plenary consideration to the argument even though it was not raised prior to the motion for new trial and was inconsistent with an unexcepted-to jury instruction. Since the question was purely one of law and would not necessitate a new trial however it was decided, the Sixth Circuit did not find Rule 51 a bar to post-verdict review.

Shearson suggests that when parties fail to object to pertinent jury instructions, lower courts uniformily refuse to consider even pure questions of law on post-verdict motions unless those questions were first raised in a motion for directed verdict. But as *Solomon* indicates, any such rule is far from universal. Indeed, the Ninth Circuit has taken the position that it will consider issues raised for the first time *on appeal* "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *In re Wind Power Systems, Inc.*, 841 F.2d 288, 290 n.1 (9th Cir. 1988); *see Romain v. Shear*, 799 F.2d 1416, 1419 (9th Cir. 1986), *cert. denied*, 107 S.Ct. 2183 (1987). The Seventh Circuit has adopted an intermediate position.

> In *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), we held that "something less than a formal motion for a directed verdict" suffices to preserve a party's right to seek a judgment n.o.v. based solely on a question of law. *Id.* at 274. The purpose of the directed verdict requirement, we explained, is to preserve a party's Seventh Amendment right to a jury, and to allow a party to remedy any deficiencies in its proof before the case goes to the jury. *Id.* at 273. As we noted in *Benson*, neither of these concerns is implicated when the basis of the judgment n.o.v. motion is a pure question of law, which is outside the province of the jury.

Kladis v. Brezek, 823 F.2d 1014, 1017 (7th Cir. 1987).

Shearson's suggestion that a directed verdict motion arguing the impropriety of the offset was necessary to preserve that issue for post-verdict review also confuses the requirements of Fed.R.Civ.P. 50 with those of Rule 59. Phenix Federal's motion was not an attack on the sufficiency of the evidence. As pointed out in the Petition, there is no directed verdict precondition to a motion for new trial or to alter or amend the judgment under Rule 59. "[S]uch a requirement should not be read into Rule 59 to preclude a just determination of the merits of a controversy because of a procedural mistake." 6A Moore's Federal Practice ¶59.04[5] at 59-22.

Shearson's contention that Phenix Federal failed to apprise the trial court in any way of its position on the offset and actually invited any error is refuted by the record. Phenix Federal before and during the liability phase maintained that the MTJ bond transaction was irrelevant. *See, e.g.*, Petition for Writ of Certiorari at 6. Shearson responded that the bond transaction made Phenix Federal "whole" and, indeed, constituted grounds for directing a verdict on its liability to Phenix Federal. The district court concluded that the MTJ bond transaction was relevant to the issue of damages, but not grounds for granting a directed verdict to Shearson on liability. So during the damage

phase opening statements, both sides referred to the transaction.[2] There was no reference to any potential future losses under the letter of credit. Shearson, in its damages opening statement, contended that because of the MTJ bond transaction, Phenix "has basically received full payment on its loan." Both sides submitted proposed damage instructions, none of which referred either to the $6.5 million offset or consequential damages stemming from the MTJ letter of credit. Phenix Federal's principal damage witness identified the specific items of damage Phenix Federal was seeking to recover. There was no mention of consequential damages stemming from future losses under the letter of credit. Indeed, as Shearson argued below, Phenix Federal did not present any evidence regarding the future prospects of the plant.

This hardly constitutes a "strategy" to recover future losses under the letter of credit. That element of "consequential" damages was introduced by the trial court, not by Phenix Federal, as the court wrestled with an unusual damage issue. His solution was to put the burden on Phenix Federal to prove what it would lose on its MTJ letter of credit — as a separate item of consequential damage — and then subtract $6.5 million from the total damages awarded Phenix. Thus it was in closing argument, with its evidentiary case closed, that Phenix Federal's counsel sought damages in the amount of Phenix Federal's exposure under the letter of credit — with simply a reference to the bond issue being in default and without any reference to the future prospects of the plant.

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[2] Thus Shearson's assertion that "Phenix was the first party to bring the MTJ bond transaction to the jury's attention" is misleading. (Opp. 3). Phenix Federal consistently argued against the relevance of the MTJ bond transaction prior to the damage phase of the case. It was only after the trial court indicated evidence of the transaction would come in during that phase that Phenix Federal's counsel mentioned it in his damages opening statement in anticipation of Shearson's argument that Phenix Federal had been made "whole" as a result of its participation in the bond transaction.

Shearson makes much of statements made by counsel after the trial court crafted Instruction No. 41. But as a logical matter, there is no meaningful distinction between vocal assent and assent by silence. The issue remains: Does Rule 51 bar post-verdict review of a pure question of law that does not implicate the jury's fact-finding? All the "invited error" cases cited by Shearson involve situtations where the appellate court was asked to upset a finding made by the jury. That is not what Phenix Federal asked for in its Rule 59 motion.

Even if there had been a "strategy" to recover future losses under the letter of credit — which was clearly not the case — the only burden Phenix Federal would have assumed was to prove the extent of those losses. The jury could have considered the $6.5 million, which was part of the MTJ transaction, in evaluating whether Phenix Federal would ultimately suffer a net loss on that transaction. But the burden should have been Shearson's to prove that the $6.5 million was a reasonably certain sum[3] from a non-collateral source that should properly offset *other* items of damage — *e.g.*, the amounts of the original loan and subsequent advances and the costs of administrative supervision of the ethanol plant. There was no way Shearson could prove the $6.5 million was a reasonably certain offset without proving the plant would be successful through 2004,

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[3] Shearson's contention that Phenix Federal did not argue in its Rule 59 motion that the $6.5 million "was not reasonably certain" reads that motion very narrowly. (Opp. 6 n.5). The entire thrust of the motion was that the plant was not likely to succeed and at most the $6.5 million would allow Phenix Federal to spread its losses over time.

Shearson's assertion that the $6.5 million repaid VBCA's indebtedness to Phenix Federal (Opp. 3) is incorrect. The $6.5 million did not discharge the VBCA debt. It was still carried on the books of Phenix Federal at the time of trial. Given Phenix Federal's corresponding exposure under the letter of credit and posting of collateral, Phenix Federal's auditors treated the $6.5 million as a borrowing by Phenix Federal.

that the bonds would be paid off with plant revenues, and that Phenix Federal, therefore, would not have to honor its letter of credit.

This brings us to the third question presented in the Petition: If a jury instruction to which there is no objection misallocates the burden of proof on an important issue, is the misallocation "plain error" or is appellate review precluded by Fed. R. Civ. P. 51? The conflict in the lower courts on this issue is patent and Shearson's only response is to ignore it. The Second, Third, Fourth, Fifth, and Sixth Circuits have all held that misallocation of the burden of proof on an important issue is "plain error." On the other hand, the First Circuit by its own admission has never found plain error in a civil case, and the Seventh[4] and Ninth Circuits reject any application of the plain error standard in civil cases.

If the offset in this case was improper either because proceeds from the MTJ bond transaction constituted a collateral source payment or because any net benefit from the MTJ transaction was too speculative to constitute an offset, the effect of the error was devastating. It reduced a $5.1 million judgment to zero. The implications are equally dramatic if the offset was proper in theory, but Shearson should have borne the risk of any uncertainty about its amount by proving the ethanol plant would be successful through the year 2004. As Shearson's counsel conceded in closing argument, the burden of proving the plant's prospects was, for all practical purposes, impossible to carry.

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[4] If there was any ambiguity in the Seventh Circuit's position, it was eliminated by *Deppe v. Tripp*, 863 F.2d 1356, 1362 (7th Cir. 1988), where the court held "that in civil cases a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial."

Procedural rules should not become empty formalisms or vary with the predilections of each forum. This case affords the Court an opportunity to infuse some sorely needed analytical content into the concepts of "waiver" and "plain error" in civil cases.

Respectfully submitted,

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